October Term, 1912. No.
301 - 18659.

186 I.A. 9

MARIE CASPER, a minor, by MATHEW CASPER, her next friend, Defendant in Error,	ERROR TO
vs.	CIRCUIT COURT,
ANDREW GECK and EMIL GECK, Plaintiffs in Error.	COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse an order and judgment of the Circuit Court of May 18, 1913, refusing to enter a nunc pro tunc order for the amendment of the bill of exceptions theretofore signed by the trial judge.

An appeal to this court was pending at the time plaintiff in error filed said motion and the case appealed, No. 18361, Marie Casper, a minor, by Mathew Casper, as next friend, v. Andrew Geck and Emil Geck, has heretofore been disposed of, the opinion therein being filed February 4, 1914. A motion to consolidate this case with the case appealed has been heretofore denied.

The amendment sought to be made by plaintiffs in error was the certifying by the trial judge of six affidavits made on their behalf in support of their motion for a new trial in the court below as a part of the bill of exceptions forming a part of the record in the appeal case, No. 18361. The affidavits set forth certain alleged misconduct of the jurors who tried the case in the court below and rendered the $4,000 verdict in favor of defendant in error for personal injuries.

On the hearing of the motion in question the only evidence offered in support thereof, so far as this record shows, was the six affidavits aforesaid found in the files of said cause in the lower court, and the endorsements thereon

October Term, 1912. No.

201 - 16686.

Present:

MARIE CURTIN, a minor, by MATHEW CURTIN, her next friend,

Defendant in Error,

vs.

INDEMNITY COMPANY OF NORTH AMERICA,

Plaintiffs in Error.

ERROR TO

CHAUTAUQUA COUNTY,

BOOK COUNTY.

1861 I.A. 6

MR. JUSTICE THEODORE BRYLAWSKI THE OPINION OF THE COURT.

This writ of error is prosecuted to review an order and judgment of the Circuit Court of May 16, 1910, refusing to enter a nunc pro tunc order for the indemnity of the bill of exceptions tendered by the trial judge.

It appears to have been agreed upon by the attorneys for the plaintiff in error that said motion and the order refusing, No. 1 and, Marie Curtin v. Mayer, by Mathew Curtin, her next friend, v. Indemnity Company of North America, was interpleaded with and, the opinion therein being filed February 7, 1911. A motion to consolidate this case with the case cited has been heretofore denied.

The statement which is to be made by plaintiffs in error, is the restriction by the trial judge of his activities upon his behalf in support of their motion for a new trial. See the order below as a part of the bill of exceptions tendered in court at the regular term of the circuit court, No. 3.

Two of defendants set forth certain alleged misconduct of the jurors who tried the case in the court below and contend that such conduct is sufficient ground in support of a motion for a new trial.

On the hearing of the motion in question the only evidence offered in support thereof, was that of John Jones, one the six affidavits referred to in the bill of exceptions in the lower court, showing misconduct of the jurors

of the clerk of the court showing that they were all filed December 23, 1911.

The record in this case does not contain the motion to amend the bill of exceptions, and does not show the date of the judgment in the trial court, or when the original bill of exceptions was filed, or in what time it was required by the court to be filed. It does recite that due notice of said motion was given to defendant in error's attorneys, and that said attorneys were present at the hearing of said motion. Defendant in error states in her brief and argument that the original judgment was entered in the original suit December 23, 1911; that the time for filing of the bill of exceptions sought to be amended expired sixty days thereafter, February 21, 1912; and that it was filed February 13, 1912. Her said statement is unquestioned. There is no proof in this record that the original bill of exceptions did not contain the said affidavits as parts thereof, but we may assume that it did not contain said affidavits as parts of it as it is unquestioned by defendant in error.

A bill of exceptions when signed and sealed by the judge, and properly filed in the case, becomes part of the record of the case to which it relates. At any time during the term of court in which the judgment was rendered, it may be amended by the presiding judge who signed it without notice. After the term has expired it can only be amended upon due notice, and by order of the court upon proper evidence submitted. Heinsen v. Lamb, 117 Ill., 549.

When such an order of the court amending any record is resisted, as it was in this case, it can not be legally made upon parole evidence, but only upon sufficient evidence appearing by some memorandum, minute or note of the judge, or something appearing on the records or files of the court,

of theories of the court showing that they were all tried October 22, 1911.

The record in this case does not contain the motion to amend the bill of exceptions, nor does it show the date of the judgment in the trial court, or when the original bill of exceptions was filed, or in what time it was required by the court to be filed. It does recite that due notice of said motion was given to defendant in error's attorney, and that said attorneys were present at the hearing of said motion. Defendant in error states in her brief and argument that the criminal judgment was entered in the original cause November 23, 1910; that the time for filing of the bill of exceptions would thus be another period sixty days thereafter, February 22, 1911; and that it was filed February 16, 1911. Her said statement is uncontradicted. There is no proof in this record that the original bill of exceptions was not certain and efficacious as parts thereof, but we say assume that it did not contain such efficacious as parts of it as it is interpreted by defendant in error.

The [illegible] A bill of exceptions when signed and sealed by the judge, and properly filed in the case, becomes part of the record of the case to which it relates. As any case coming that court of court in which the judgment was rendered, it may be amended by the presiding judge who signed it without notice. After the term has expired it can only be amended upon due notice, and by order of the court upon proper evidence submitted. Duncan v. Lamb, 117 Ill., 244.

Then such an order of the court amending any recital is required, as is now in this case, it can not be legally made upon parole evidence, but only upon satisfactory evidence otherwise by some instrument, minute or note of the judge, or something appearing on the records or files of the court,

to show the facts in respect of which the amendment is sought to be made. No record can be made or determined from the memory of witnesses or the personal recollection of the judge himself. C., R. & St. P. Ry. Co. v. Walsh, 150 Ill., 607; Stein v. Meyers, 253 Ill., 199.

Where a party seeks to question in this court the correctness of an order of a court in allowing or denying a motion to amend a bill of exceptions, it is incumbent upon him to show by a bill of exceptions the evidence upon which the court acted. In the absence of such a showing the usual presumption will prevail that the court's order and judgment was supported by the evidence. Gebhis v. Mooney, 181 Ill., 255; C., R. & St. P. Ry. Co. v. Walsh, supra; Stein v. Meyers, supra.

There is no proper evidence in this record that the affidavits sought to be made a part of the bill of exceptions in question were ever read to the court or presented to him for consideration on the motion for a new trial or otherwise. It is not sufficient to show that they were filed in the case. The recital in the record "that it appeared to the court from an examination of his minutes" that said affidavits were read to the court during the argument of the motion for a new trial is insufficient, as it is not a recital of the evidentiary facts, but merely a conclusion therefrom. The minutes should have been introduced in evidence, and incorporated in this record.

The judgment of the court is affirmed.

AFFIRMED.

October Term, 1912. No.
360 - 18722.
18722

186 I.A. 11

PORTAGE RUBBER COMPANY, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
FRUIN DROP FORGE COMPANY, Plaintiff in Error.	OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This action was brought June 11, 1912, against Fruin Drop Forge Company, plaintiff in error, to recover the price of 3,792 hoof pads manufactured for it by defendant in error. The case was tried without a jury, and judgment was entered in favor of Portage Rubber Company, defendant in error, for $388.06 and costs.

Plaintiff in error asks a reversal of the judgment upon three grounds, (1) that there was no contract between the parties for the manufacture of the goods in question; (2) that there was no delivery of the goods sued for; (3) that there was no agreement as to the price of the goods, and no proof in the record as to their value.

The evidence discloses that plaintiff in error had previous to November 20, 1911, placed its moulds in the hands of defendant in error from which to manufacture pads on orders of plaintiff in error. On November 20, 1911, plaintiff in error ordered a bill of pads from defendant in error, using these words and figures:

"Enclosed please find check for balance due Sept. a/c as per request.
"Kindly prepare the following order to be shipped us on or after Dec. 1st.

4500	pieces	#4	Rubbers
3000	"	#3	"
3500	"	#6	"
10000	"	Total	"

"If you will you may keep in stock over and above each order sent about 2000 pieces each of the above three sizes as they seem to be standing up very good: No. 3-4-6."

Defendant in error replied to said letter as follows:

"We acknowledge with thanks your order of 20th for - 4500 pieces #4, 3000 pieces #3, 2500 pieces #6 - rubbers from your moulds at 32½ per pound and to be shipped on or after December 1st.

"We also note that you would like for us to keep in stock over and above each order sent about 3000 pieces each of above sizes. We will be glad to do this, but we would like for you to send us your regular order for same and mark the order 'to be shipped when instructed to do so'.

"You do not say how you want the fabric on these rubbers, but we are proceeding with the order taking it for granted that you want two plies of Duck clear across the heel like the new cutting dies you recently sent us. In the event that this is not correct, kindly advise us by wire upon receipt of this letter."

Defendant in error manufactured the 10,000 pieces of rubber, Nos. 3, 4 and 6, as above ordered, and shipped them to plaintiff in error who afterwards paid for them at 32½¢ per pound. Defendant in error also began the manufacture of the 2,000 pieces each of Nos. 3, 4 and 6 pads, and completed 1,383 of No. 3, 1,797 of No. 4 and 1,295 of No. 6 pads, when it received a letter of December 20, 1911, from plaintiff in error stating that it contemplated making some changes and requesting defendant in error to await further instructions concerning the 6,000 order. Defendant in error ceased manufacturing those 6,000 at once and wrote to plaintiff in error that it had practically all of them made up, and that their idea of requesting a regular order for them was to make their records clear. Plaintiff in error again replied that defendant in error did not accept their order of Nov. 20, 1911, for the 6,000 pads, 2,000 of each Number 3, 4 and 6, and that owing to a change it had made it could not use them.

We think that defendant in error's letter of Nov. 23, 1911, constituted an unconditional acceptance of plaintiff in error's request to manufacture and keep in stock for it the 6,000 rubber pads. The words, "We will be glad to do so", taken alone should undoubtedly be construed as an acceptance, and the request for a regular order for the goods to be shipped

when so instructed, added to the acceptance, did not make it a conditional one. The rule is that if an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because followed by inquiries whether the offerer will change his terms, or as to future acts, or because accompanied with expressions of hope, or suggestions, or requests, etc. 9 Cyc. 289 and 290; Culton v. Gilcrist, 92 Iowa, 718; Brown v. Bairns, 63 Kans., 603; Phillips v. Moor, 71 Mo., 78; Stevenson v. McLean, 35 P. D. R., 148; Lawrence v. M. L. S. & W. Co., 84 Wis., 427; Peoria M. Co. v. Davenport G. & M. Co., 68 Ill. App., 104.

If there was any doubt about the contract being accepted by letter, the doubt is all removed by other evidence. One Mr. Wildman, an agent of defendant in error, testified that Mr. Fruin, secretary-treasurer of plaintiff in error, told him January 23, 1912, that he would take for his company the rubber pads which defendant in error then had on hand, but wanted to take his time in so doing, as he was indebted quite a lot to them. This proposition was accepted by defendant in error by letter with a request to know if it would be satisfactory for it to make the shipment immediately, provided it dated the invoice March 1, 1912. The reply to that letter by plaintiff in error was, in substance, that it would instruct defendant in error when it wanted the pads and not to ship them until defendant in error heard from it.

Afterwards plaintiff in error on April 6, 1912, ordered 500 of the No. 3 rubbers and defendant in error sent it a box containing 583 pieces of No. 3, and in its letter stated that those were a part of the rubbers in question, and also stated the number of the 6,000 still on hand. The box of 583 rubbers was paid for by plaintiff in error at the same price as former orders were paid for, 32½ cents per pound , but later it refused to accept any more of said rubbers,

although defendant in error offered repeatedly to ship them to it.

The foregoing evidence not only settled the question that there was a contract, but made it also clear that the agreed price was 38½ cents per pound, the price allowed by the court to defendant in error. The judgment was for the correct amount at 38½ cents per pound, as the evidence showed there were 1,194 pounds.

The goods in question were manufactured and boxed for delivery to plaintiff in error long before the suit was brought. They had been accepted by plaintiff in error and were held at its request for delivery until it called for them. Defendant in error repeatedly offered to deliver them, and plaintiff in error finally refused to accept them at any time. They were the property of plaintiff in error and defendant in error had done all the law required it to do to recover the price thereof. Schneider v. Masterson, 20 Ill., 404; Briggs v. Harvey, 2 R. I., 364; Central Leith. & Engr. Co. v. Moore, 75 Mich., 170; Dorey v. Hollis, 35 Ind., 488.

The judgment is affirmed.

AFFIRMED.

451 - 15922.

FALLS CITY TANNERY, a corporation, Appellee,	)	186 I.A. 13
vs.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
W. D. ALLEN MANUFACTURING COMPANY, a corporation, Appellant.	)	

186 I.A. 13

STATEMENT OF THE CASE. On and prior to September 2, 1909, the plaintiff, Falls City Tannery, a Kentucky corporation, was engaged in the business of tanning hides at Louisville, Kentucky, and the defendant, an Illinois corporation, was engaged in the manufacture and sale of leather belting, at Chicago, Illinois. On said date, at Louisville, the defendant, by J. J. McCauley, its agent, executed and delivered to the plaintiff the following instrument:

> "We agree to take all the #1 Butts on hand at Louisville @47¢, the two piles examined of lighter weights @45¢, and the eleven hundred more or less, at Philadelphia, Pa., in the hands of Kirkpatrick & Co., if unsold, at 46¢. Terms on these eleven hundred to be, 5% - 10 days, Oct. 5th. Others 5% 10 days upon receipt of Butts. All f.o.b. Louisville and Philadelphia".

The number of belt butts of each grade, the total weight thereof as given by plaintiff and the total price to be paid by defendant were as follows:

"382 No. 1 Belt Butts (total weight 10796 lbs.) at 47¢ per lb.	$5,074.12
191 No. 2 Belt Butts (total weight 4745 lbs.) at 45¢ per lb.	$2,135.25
1103 No. 2 Belt Butts (total weight 27505 lbs.) at 45¢ per lb.	$12,377.25
Total -	$19,586.62"

All of said belt butts in Louisville were delivered by plaintiff to defendant on September 3, 1909, f.o.b. Louisville, and all in Philadelphia were likewise delivered on September 4, 1909, f.o.b. Philadelphia. Prior to the execution of said instrument the belt butts in Louisville were inspected by said

McCauley, but those in Philadelphia were not inspected by him. The defendant paid plaintiff on account of said belt butts the total sum of $17,209.37, leaving a balance unpaid on the contract price of $2,677.25. On October 20, 1909, the defendant notified plaintiff that there was a shortage in the weight of the belt butts, and subsequently tendered to plaintiff the sum of $2[illegible].04 in full settlement of the account. Plaintiff refused this tender and on April 25, 1910, commenced this suit.

It appears that a "belt butt" is the hide of a steer or cow which has been tanned with oak bark, and is free from foreign substances. The butts are trimmed to an average width and are graded as light, medium, heavy and extra heavy according to their weight, which ranges from 2[illegible] to 40 pounds. After tanning the butts, in order to make use of them for leather belting, it is necessary to subject them to another process known as "currying". This process is described by one of defendant's witnesses as follows:

> "The first course is to shave the leather, that is take all the flesh off of it. The next is to mill it. And the next is to scour it. And the fourth process is to bleach it, that is to get it even color and take out all the imperfections in the color. The next is to stuff it, which is an application of oil and tallow mixed together. And the next process is, the leather is hung up in a green state, or after this application of oil and tallow, to dry. Then the oil and tallow which does not dry into the leather is scraped off. The next process, the leather is put into what we call stretchers. After which it is glazed. The leather is then finished for belting. The object of the scouring process is to get rid of all the extraneous matter in the hide, to clarify the grain and to soften the leather; in other words, to put the leather in a condition to take in the oil and tallow, called 'dubbing'. * * The oil and tallow which is put into the leather will more than make up the loss that the leather has sustained in the shaving and milling process."

The case was tried before a jury, and on the trial the plaintiff proved the execution and delivery to it of the said instrument of September 2, 1909, the delivery of said belt butts to the defendant as aforesaid, and rested. The plaintiff claimed

that defendant owed it the said balance of $2,377.25 for said belt butts, together with interest thereon, to-wit: $316.75, amounting in all to the sum of $2694. The defendant claimed that it was indebted to the plaintiff in the sum of only $298.04, which sum it had previously tendered to plaintiff, and set up in its amended affidavit of merits and urged upon the trial, as a defense to the balance of plaintiff's claim, that plaintiff had, with intent to cheat and defraud defendant, knowingly and wilfully loaded, charged or treated the said belt butts or hides with large quantities of glucose, for the purpose of wrongfully increasing the weight of said hides, and had thereby deceived and defrauded defendant to the extent of the amount and weight of such foreign substance so applied and absorbed by the hides. At the conclusion of the defendant's case the trial court instructed the jury to return a verdict in favor of the plaintiff for $2,394, which they did, and judgment was entered upon the verdict against the defendant.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The principal point urged by counsel for the defendant for a reversal of the judgment is that the trial court erred in directing the jury, at the close of the defendant's evidence, to return a verdict for the plaintiff.

The testimony introduced on behalf of the defendant tended to show that at the time defendant's agent, McCauley, inspected those of the belt butts which were in Louisville for the purpose of ascertaining their grade, quality, trim, etc., plaintiff knew that defendant, if it purchased them, intended to manufacture them into leather belting; that at that time it was impossible for McCauley, from such inspection, to determine whether the butts contained any foreign substance such as glucose or other weight increaser; that at that time the president of

plaintiff represented to McCauley that said butts had not been "loaded" or "doped", and that the butts in Philadelphia were of like quality and in like condition; that, as a matter of fact, glucose had previously been applied to the butts to the knowledge of the president of plaintiff; that McCauley, after purchasing the butts for defendant, instructed plaintiff to ship the same to Hans Rees & Sons, Asheville, North Carolina, for the purpose of there having them "curried"; that after their arrival at Asheville and before they were "curried" the leather was weighed: that usually leather after being put through the currying process will weigh as much as it does when in the rough, if not more; that this is so for the reason that the loss of weight in the leather, occasioned by the shaving, milling and scouring processes, is usually more than made up from the amount of oil and tallow put into the leather; that after this particular leather was "curried" it was found that there was a shrinkage in the weight thereof of 4,000 pounds; that glucose oozed out of the leather in large quantities when the leather was put under the scouring machine; and that the use of glucose in large quantities is not recognized as proper in the tanning of leather, but is sometimes used by some tanneries for the purpose of increasing the weight of the leather.

"A person who has been fraudulently induced to enter into a contract has the choice of several remedies. He may repudiate the contract and, tendering back what he has received under it, may recover what he has parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action of deceit the damages caused by the fraud." (20 Cyc. 87; Peck v. Brewer, 48 Ill. 54; Allin v. Millison, 72 Ill. 201; Springer v. Siltz, 133 Ill. App. 558.) "Moreover, if sued upon the contract

he may set up the fraud as a defense, or as a basis of a claim for damages by way of recoupment or counterclaim." (20 Cyc. 97; Peck v. Brewer, supra: White v. Sutherland, 34 Ill. 181, 191.)

"The rule of caveat emptor only requires the exercise of such care and attention as is exercised by ordinarily prudent men in like business affairs, and only applies to defects which are open and patent to the senses. And the doctrine does not apply in cases of positive fraud or misrepresentation by the vendor as to a material fact, where the purchaser, acting with reasonable prudence, had a right to rely and did rely upon the representation." (39 Cyc. 1279.) "Fraud may consist in making a false representation with the knowledge at the time that it is false, with a design to deceive and defraud, or in the wilful concealment of the truth for a similar purpose." (McConnell v. Wilcox, 1 Scam. 344, 348; Lockridge v. Foster, 4 Scam. 569; Aertson v. Ridgway, 18 Ill. 23, 28; Stewart v. Wyoming Cattle Co., 128 U. S. 383, 388.) "If the defect is latent and known to the seller his intentional omission to disclose it constitutes actionable fraud. * * And where the defect is latent the purchaser may recover notwithstanding that he examined the article and failed to discover the defect". (20 Cyc. 93.)

In Frazer v. Howe, 106 Ill. 568, 573, it is said: "Motions to exclude evidence and motions to instruct the jury to find for the defendant * * are in the nature of demurrers to evidence, and hence they admit not only all that the testimony proves, but all that it tends to prove. * * It is not within the province of the judge, on such a motion, to weigh the evidence and ascertain where the preponderance is. This function is limited strictly to determining whether there is, or is not, evidence legally tending to prove the fact affirmed." In Libby, McNeill & Libby v. Dock, 222 Ill. 206, 212, it is said: "If there is no

evidence, or but a scintilla of evidence, tending to prove the material averments of the declaration, the jury should be directed to return a verdict for the defendant. If, however, there is in the record any evidence from which, if it stood alone, the jury could, 'without acting unreasonably in the eye of the law', find that all the material averments of the declaration had been proven, then the cause should be submitted to the jury." The same rules are applicable where the defendant introduces evidence tending to support an affirmative defense to the plaintiff's cause of action, and the plaintiff, at the close of the defendant's evidence, moves for a directed verdict in his favor. (Anthony v. Wheeler, 130 Ill. 128, 132; Wolf v. Chicago Sign Printing Co., 233 Ill. 501, 504; Woodman v. Illinois Trust & Savings Bank, 211 Ill. 576, 581.) In Frazer v. Howe, supra, it is said: "If there is no evidence before the jury, on a material issue, in favor of the party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative; but when there is such evidence before the jury, it must be left to them to determine its weight and effect."

Considering the evidence introduced in this case by the defendant, in support of its affirmative defense as disclosed from its amended affidavit of merits, together with all legitimate inferences which may be drawn from such evidence in its favor, and also considering the rules of law above mentioned, we are of the opinion that the trial court in this case erred in instructing the jury at the close of defendant's case to return a verdict in favor of the plaintiff for said sum of $2,894.

Accordingly, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

20413

ANNA C. HALLSTROM,
Appellant,

vs.

JAMES T. McCULLOUGH and
SUSAN E. McCULLOUGH,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

186 I.A. 14

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

The appellant filed a bill in equity in the Superior Court and obtained a temporary injunction which that Court afterwards dissolved. From the order dissolving the injunction this appeal is prosecuted by the complainant in the bill. The order was clearly an interlocutory order. Complainant by her bill sought other relief than an injunction and the order dissolving the injunction cannot be held in legal effect a final decree dismissing the bill.

The Section of the Practice Act which provides for appeals from interlocutory orders, Laws of 1907, p. 469, Section 183, does not authorize an appeal from an order dissolving an injunction, and as the right of appeal is purely statutory it follows that no appeal lies from such an order.

The appeal is dismissed and the Court allows to the attorney for appellees a solicitor's fee of twenty dollars, to be taxed as part of the costs of the appeal.

APPEAL DISMISSED.

March Term, 1913, No.

304 - 19312

MAX MEYERS, Appellant, vs. JOEL JOHNSON, Appellee.	Appeal from County Court, Cook county.

186 I.A. 37

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Appellant, Max Meyers, sued appellee, Joel Johnson, in assumpsit for rent of certain premises at the rate of $45 per month, for the months of July, August, September, October, November and December of the year 1911, and January and February, 1912, and for $10 for each of the months of March and April, 1912. The declaration consisted of a special count and the common counts.

On the trial, the court below entered judgment against plaintiff, appellant, for costs in favor of appellee. This appeal is to reverse that judgment.

It appears from the record that one Henry Hogans, then the owner of some flats and store buildings on Harrison street, between Lombard and Harvey avenues in Oak Park, Illinois, entered into a written lease with the appellee, Joel Johnson, for one of the flats and stores for the period from September 1, 1909, to April 30, 1911, for the sum of $900, payable $45 a month in advance on the first day of each month during said term. On August 31, 1910, the property in question was purchased by the plaintiff, Meyers, and with the lease was conveyed and assigned by Hogans to Meyers.

After signing the lease, Johnson moved into the premises and paid his rent regularly at first to Hogans and then, after August, 1910, to W. F. Cotton, a real estate agent who took charge of the building for appellant. Sometime in March, 1911,

more than a month before the lease expired, Cotton asked Johnson if he was going to stay over after his lease ran out. To this Johnson responded that he intended to move out as soon as a building, which he was constructing, was completed. Cotton then told Johnson that if he did not move out on April 30, 1911, the landlord would hold him for another term. Appellee Johnson held over and continued to remain in possession of the demised premises after the expiration of the written lease until July 4, 1911. On May 25, 1911, Cotton served the following notice on Johnson:

" J. P. Johnson, Esq.,
Oak Park, Illinois.

Dear Sir:

You will take notice that inasmuch as your lease to the premises held by you under me in the building owned by me, at the northwest corner of Lombard Ave. and Harrison Street, expired by its terms on April 30, 1911, and you are now holding over, that I have elected to consider you a tenant from year to year of said premises under the same terms and conditions (except as to the period of the term thereof) of the said lease expiring April 30, 1911.

Yours very truly,
(Signed) Max Meyers.

Chicago,
May 25, 1911."

Appellee Johnson paid no rent after June 30, 1911. The premises remained vacant from July, 1911, until March 15, 1912,- eight and a half months. In the meantime, Cotton, the agent, attempted by advertising in the newspapers and placing "For Rent" cards in the windows to find a tenant, but was unable to do so until March 15, 1912, when the premises were rented to another tenant at $35 per month,- $10 per month less than the rent reserved in the Johnson lease.

The record shows that in February, 1911, appellee Johnson commenced the erection of a $10,000 building for his own use and occupancy across the street from the demised store and flat. This building was not completed until the latter part of June, 1911, when Johnson moved out of the premises in question and into his own newly erected building.

The only defense shown in the record to the action is that appellee vacated the premises, after holding over, as above stated, because there were no bars on the back windows of the store. The only foundation for this defense rests in a written agreement signed under seal by Harry Hogans, the son of Henry Hogans, at the time that Johnson signed the lease in question. That agreement was as follows:

> "This agreement made this twenty-fourth day of July, A. D. 1900, between Henry Hogans, party of the first part, and Joel Johnson, of the second part,
>
> Witnesseth: That the said party of the first part agrees to build a barn on premises,
>
> And to put iron bars on the two rear windows of store,
>
> And not to let any other stores in block to be used for grocery or market.
>
> And, in case party of the first part fails to comply with terms of this agreement, the lease will be null and void.
>
> Henry Hogans,
> Harry Hogans, Agt. (Seal)
>
> L. H. Gerhardt
> (Agent)
>
> Joel Johnson."

It appears that when Johnson asked for bars on the windows, Harry Hogans, who had brought the lease to Johnson to be executed, told Johnson that the matter of bars on the windows had not theretofore been mentioned, and that he, Harry Hogans, was not sure Johnson could have them, but Gerhardt, the agent, spoke up and told Harry Hogans that he could sign the paper and that his father would say it was all right. Harry Hogans thereupon signed the agreement.

There is no evidence to show that Harry Hogans had any authority from his father to execute any agreement in regard to the bars. The boy, who was only eighteen years of age at the time, disclaimed any authority from his father regarding the bars. He brought the lease, already drawn, to the office of the agent for execution by Johnson. Henry Hogans afterwards signed the lease. The bars were not put on the rear windows of the store and no mention was made of them by appellee to Hogans, or to Max Meyers, durg

ing the term of the lease. Henry Hogans testified that the first he ever heard of these bars was after the suit in question was started. The plaintiff, Meyers, saw Johnson but once during the term of the lease, and no mention was then made about the bars or their absence.

In our opinion, the payment of rent by appellee continuously for twenty months, with the knowledge of the absence of the bars on the windows, waived the performance of that covenant, even if it was executed by a duly authorized agent. Hanson v. Hanson Hardware Co., 135 N. W. Rep. 766; Monson v. Bragdon, 159 Ill. 61. But, there is no proof of any authority in Harry Hogans, the son, to execute the paper relied on in behalf of his father,, nor was there any ratification of the agreement by Henry hogans or by appellant. The voluntary payment of rent by appellee so long as he remained in possession, without complaint or protest, estops him from setting up a right to declare his lease null and void after abandoning the premises. Orcutt v. Isham, 70 Ill.App. 102; Noble v. Chrisman, 88 Ill. 186.

By holding over under the lease, appellee gave the landlord the undoubted right to elect to treat such holding over as a tenancy for another year under the terms of the original lease. Goldsbrough v. Gable, 152 Ill. 594; Webster v. Nichols, 104 Ill. 160; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; McKinney v. Peck, 38 Ill. 174.

The evidence in the case shows a right of recovery, and fails to show any legal defense to the action.

The court below erred in refusing to give instructions Nos. 7, 8 and 9, requested by the plaintiff. These instructions were as follows:

> "7. The court instructs the jury that it is a rule of law that a person dealing with one known to be an agent, or claiming to be such, is bound at his peril to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent

authority."

"8. The court instructs the jury as a matter of law that before Henry Hogans can be bound by the acts of his son, Harry Hogans, it must be shown by the defendant, by competent evidence, that Henry Hogans authorized Harry Hogans to act for him and in his behalf in executing the special agreement relied upon by the defendant."

"9. The court instructs the jury as a matter of law that before a principal can be bound by the acts of his agent, it must be shown by the party asserting such agency that the principal authorized such agent to act for him and in his behalf, and that such agent carried out the business of his principal and within the scope of his authority as such agent; otherwise the principal is not bound by the acts of the agent."

The instructions were correct and should have been given. Fadner v. Hibler, 46 Ill. App. 539; Reynolds v. Ferree, 86 Ill. 570.

Error is assigned also upon the refusal of the court to give instructions Nos. 2, 4, 5 and 6, requested by the plaintiff. These instructions relate to the law of eviction. The court did not err in refusing these instructions, for there is no question of eviction in the case.

If Hogans was, by the written agreement signed by his son, obligated to put iron bars in the two rear windows of the store, his failure to do so did not, in law, constitute an eviction, either actual or constructive. If Hogans defaulted in that regard, upon due notice and request by appellee and failure on the part of Hogans to perform, appellee could have put the bars on the windows himself and charged the expense against the landlord's demand for rent. The obligation to put bars on the windows would be on a parity of a covenant to repair. The breach of such a covenant does not amount to an eviction where the tenant remains in full and complete enjoyment of the premises and holds over after the expiration of the lease.

For the errors indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1913, No.

366 - 19382

WILLIAM WENDNAGEL et al., copartners as Wendnagel & Co., Appellees,	Appeal from Superior Court, Cook County.
vs.	
GEORGE T. HOUSTON et al., copartners as George T. Houston & Co., Appellants.	

186 I.A. 39

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon the third trial of this cause, a judgment entered on the former trials having been reversed for errors in procedure.

By agreement of counsel for both parties, made in open court at the commencement of the trial, there was submitted to the jury but one question, namely, the difference between the contract price of the lumber described in the contract sued upon, of $41 per thousand feet, and the market price at Chicago of the 100,000 feet of white oak lumber, covered by the contract, in the month of November, 1903.

It is contended on behalf of appellants, the defendants below, that the evidence of the plaintiffs is insufficient in law to sustain the judgment. It is urged in support of this contention that the plaintiffs failed to prove by any of their witnesses and by competent evidence the market price of lumber described in the contract in Chicago in November, 1903, and that none of the plaintiffs' witnesses qualified so as to be competent to give any opinion as to such market value. With this contention we cannot agree. No objections were made on the trial to the competency of the witnesses to testify. The question as to whether the witnesses proved themselves qualified as experts on value of white oak lumber in Chicago was not raised in any other way. The

plaintiffs offered in evidence the contract and put six witnesses upon the stand who testified upon the question of the market value of the lumber described in the contract in Chicago in November, 1903, in quantities of 100,000 feet. These witnesses testified to values ranging from $50 to $52 per thousand feet. Defendants produced five witnesses in court and read the depositions of three others. The testimony of the witnesses produced by the defendants was to the effect that the market price of lumber in November, 1903, was $40 per thousand feet in quantities of 100,000 feet. There was no middle ground based upon the evidence of the parties between the prices named by the witnesses for the plaintiffs and the defendants. We cannot say that the award of the jury against appellants for the sum of $900 was excessive. The question was one of fact for the jury, and the credibility of the witnesses was for the jury. We find no substantial and real ground for holding that the verdict of the jury was manifestly against the preponderance of the evidence.

It is further urged that counsel for plaintiffs, in his closing argument to the jury, indulged in improper remarks, bringing to the attention of the jury incompetent and excluded evidence. The record shows that, in his closing argument to the jury, counsel for the plaintiffs said:

> "Gentlemen, you are entitled to look at this case, not only what has been actually procured, but from all the facts and circumstances that the evidence tends to prove, and I think that from all the facts and circumstances it is a fair deduction and not a radical conclusion, that if the price of this lumber had not gone up, the material would have been delivered. Why not?"

This statement was objected to by counsel for defendants and the objection was sustained by the court, and the remarks were stricken out. We think the ruling of the court was correct. The non-delivery of the lumber was conceded and there was no occasion for counsel to go into the question as to why the

lumber was not delivered. We cannot say, however, that what transpired before the jury and the court, in view of the ruling of the court, injuriously influenced the jury against the defendants in their verdict. The verdict bears no evidence of being the result of passion or prejudice.

It is further urged that the defendants did not have that fair trial guaranteed to them by the law. The chief basis of this contention as presented in argument seems to be that a witness, Crissinger, was called by the plaintiffs in rebuttal, and testified that he lived in Chicago and was a manufacturer's agent for hardwood lumber, and in November, 1903, was employed as a salesman by the defendants, and that he knew Mr. Harris, who was at that time connected with defendants. He was then asked, "Did you ever have any talk with him (Harris) about this sale of this lumber in November, 1903?" This question was objected to as immaterial to the issues in the case, and counsel for plaintiffs stated, "I propose to show by this witness that Harris admitted that the value of this lumber during the year 1903 was $4, $5 or $6 more than that price." The court sustained objections to the question and the offer. The ruling of the court was obviously correct. The evidence offered was incompetent and immaterial, but we cannot say that the mere statement of what the plaintiffs proposed to show by the witness could or did in any wise affect the jury. We find no reversible error in the record. The judgment is affirmed.

AFFIRMED.

328 - 20283

SAMUEL L. WRIGHT, Defendant in Error,	)	
vs.	)	Error to Municipal Court of Chicago.
ANTON J. CERMAK, Bailiff of the Municipal court of Chicago, and H. P. CULLEN, Defendants,	)	
ANTON J. CERMAK, Bailiff, etc., Plaintiff in Error.	)	186 I.A. 41

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment against plaintiff in error and in favor of defendant in error for $8.75 and costs.

Plaintiff in error, Anton J. Cermak, as bailiff of the Municipal Court of Chicago, levied upon a certain automobile belonging to Samuel L. Wright, the defendant in error, under an execution against W. B. Dugans and A. T. Washburne. Plaintiff in error removed the automobile to a warehouse and stored it there until it was returned to the plaintiff below, Wright. Immediately after the seizure of the automobile, plaintiff Wright made demand on Cermak, the bailiff, for the return of the automobile, and that being refused, he commenced a proceeding in the Municipal Court of Chicago under Section 311-a, Chapt. 37, of the Revised Statutes on courts, Jurs ¶ 3361 making Cermak and the execution creditor, H. P. Cullen, parties defendant thereto. A trial was had in that proceeding, resulting in a judgment in favor of the plaintiff below, defendant in error here, for the automobile, and he was awarded an execution therefor and for the costs of the proceedings. The warehouse receipt for the automobile was thereupon turned over to Wright, plaintiff below, by Cermak, as bailiff, and when the plaintiff below called at the warehouse for his automobile, he was

compelled to pay $8.75 to the warehouse man for storage charges thereon. Wright thereupon commenced the action against Cermak and H. P. Cullen, claiming $15 for attorney's fees for services performed by his attorney in the proceedings above mentioned, and $8.75 which he paid the warehouse man.

On the trial, plaintiff Wright proved the payment of the $8.75 to the warehouse man, and offered to prove that he had retained an attorney in the trial of right of property proceedings, and that the attorney had performed services therein reasonably worth $15. The last item only was objected to as not a proper element of damages and the objection was sustained by the court. Plaintiff in error, Cermak, objected to the introduction of any evidence on the part of Wright, defendant in error; and at the completion of the evidence of the defendant in error, moved the court to strike all such evidence on the ground that the action of defendant in error was barred by reason of the fact that he had commenced and prosecuted to a final judgment in the Municipal Court of Chicago a trial of right of property proceedings, and had obtained and accepted the benefits thereof. These objections were overruled by the court. Plaintiff in error, Cermak, then submitted to the court three propositions and requested the court to hold them as law in the decision of the case, which propositions were as follows:

> 1. "A resort to the statutory action of a trial of right of property and a recovery therein is a waiver of an action against an officer for trespass for wrongfully levying an execution."
> 2. "The plaintiff herein had but one cause of action for the wrong committed, though a choice of remedies, and the following of either is a bar to the others."
> 3. "The plaintiff having commenced and prosecuted to a judgment in the Municipal Court of Chicago a trial of right of property proceeding, and having accepted the benefits of the judgment entered therein, has thereby precluded himself from maintaining this action."

The court refused to so hold and entered a finding against the plaintiff in error and his co-defendant and judgment

for $8.75 and costs.

It is here urged that the plaintiff below, having commenced and prosecuted to a judgment in the Municipal Court of Chicago a trial of right of property proceeding and having accepted the benefits of a judgment entered therein, has thereby precluded himself from maintaining this action, and that the court erred in refusing to hold the propositions of law above stated.

In our opinion, the contentions of the plaintiff in error here are not sound in law. The court did not err in refusing to hold the propositions of law submitted by the plaintiff in error. The question here involved is not a new one. It has been before the courts of review in the following cases, and the holding was against the contention of the plaintiff in error; Hibbard v. Thrasher, 66 Ill. 479; People v. Crowe, 130 Ill. App. 348; Jones v. People, 19 Ill. App. 300; Ilg v. Burbank, 59 Ill. App. 291.

The judgment is affirmed.

AFFIRMED.

March Term, 1913, No.

331 - 19345

STURGES & BURN MANUFACTURING COMPANY, Appellant, vs. ROOT DAIRY SUPPLY COMPANY, Appellee.	Appeal from Municipal Court of Chicago.

186 I.A. 52

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellant, the plaintiff, to recover the unpaid balance of the purchase price of milk and other cans furnished and delivered to appellee, the defendant. The amount of said balance, $1436.85, was unquestioned. Defendant sought to recoup damages for an alleged breach of contract. The jury gave a verdict for plaintiff for $500, thereby finding for defendant to the extent of the difference. The total amount of defendant's damages, however, as claimed and proven, was $837.31 less than the jury allowed it. Appellee contends such allowance is justified on the theory of exemplary damages. Neither in the pleadings nor proof is there basis for such contention. They present nothing in the nature of malice or wanton or wilful misconduct. The only question presented is whether in quality and weight, the cans were such as appellant contracted to furnish. On the record, therefore, plaintiff was entitled to a larger judgment and for that reason, if for no other, the cause must be remanded for a new trial.

But, we are of the opinion that the preponderance of the evidence was against defendant's claim of a breach of warranty. Such claim rests mainly upon the contention that it sought the milk cans relying on representations as to the weight contained in appellant's catalogue of 1906. The record clearly shows that the purchase was made after the receipt and examination

of a later catalogue, called plaintiff's new catalogue, which contains no such representations. Defendant's order was given in its letter of July 31, 1911, which refers to plaintiff's new catalogue, saying "Your new one is quite an improvement over the old one," and calls for twelve copies thereof. It purports to be in response to plaintiff's letter of July 28th, which informed defendant that allusions in one of its prior letters were evidently based on an old catalogue, and that plaintiff was sending a copy of its new and latest one, and made the offer thus availed of in defendant's said answer to send as many more as defendant might have use for. Under such circumstances, defendant cannot be heard to say that its order was given on the strength of representations in the old catalogue. The order also was for the style of cans as designated in the new catalogue.

But, if there was any warranty as to the weight or quality of the cans, it was not such as would survive acceptance of the goods. A carload of the cans was received by the defendants August 14th following the order. Defendant noted on the invoice, amounting to $1807.27, the words "Quality O. K." Later on, August 16th and October 7th, two small shipments of goods of the same kind, invoicing less than $50 each, were made. Defendant proceeded to sell the goods, and disposed of a portion of them. On November 10th, defendant wrote plaintiff, "Shall reach your account tomorrow, and make settlement as agreed." November 14th, defendant sent $500 "to apply on account," and assured plaintiff that the balance would be taken care of after the 16th. After receipt of the goods several requests for remittances were received by defendant without complaint as to the character or quality of the goods delivered. In a letter of November 20th, defendant sought a modification of the contract, claiming inability to compete with rival concerns. In reply thereto, November 22nd, plaintiff insisted

that the terms of the contract be complied with and the balance due thereon be paid as promised. It was not until after such correspondence that defendant even criticised the weight and quality of the cans. In its letter of November 25th, it complained that they were lighter and not as well tinned as cans of their competitors; but there was no allusion even then or in prior correspondence to a warranty or breach thereof.

The matters complained of were light weight and poor tinning. Neither could be regarded as a latent defect. Both were readily apparent or ascertainable on inspection if they existed. Complaint should have been made within a reasonable time after receipt of the goods. (Benjamin on Sales, Sec. 705, [7th Amer. Ed.]). From the record the conclusion is irresistible that there was an acceptance of goods delivered under an executory contract after an opportunity to inspect them. Under such circumstances, there being no proof of fraud or of an express warranty by the vendor, damages because of the inferior quality of the goods cannot be recouped. (Titley et al. v. Enterprise Stone Co., 127 Ill. 457; American Theatre Co. v. Siegel, Cooper & Co., 221 id. 145; Norton v. Dreyfuss, 108 N. Y. 90; Studer v. Fleistein, 115 id. 317.) If the goods were not of the character and quality called for by the contract, there was a waiver of the alleged defects by defendant's acceptance thereof. (Defenbaugh v. Weaver, 87 Ill. 132.)

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1913, No.

338 - 19352

NETTIE L. SPENCER et al., Appellants, vs. THEODORE C. MUELLER et al., Defendants C. M. ANDERSON AND A. W. ANDERSON co-partners, etc., Appellees.	Appeal from Superior Court, Cook County.

186 I.A. 53

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants filed their bill to foreclose a trust deed securing certain notes executed by Theodore C. Mueller and Anna, his wife, owners of the conveyed premises, on which they contracted for the erection of certain improvements. Spencer was the holder of the notes; Lang was the trustee and also occupied the relation of contractor for the improvements. Anderson Brothers were the subcontractors and were made defendants in the bill. In their answer, in the nature of an intervening petition, they set up a claim to a mechanic's lien, which was filed March 20, 1912. Amended petitions were subsequently filed, issue being taken on the one filed June 28, 1912. The latter petition alleged that the last work by the subcontractors was done March 23, 1912, and the notice of their claim of lien against said premises was served March 25, 1912. The service was made on Theodore C. Mueller only. It also appears and is so found in the decree that Spencer was holding the notes for the benefit of said Lang. A Mechanic's lien was decreed against the premises and it is from that part of the decree that this appeal is taken.

It is contended, first, that the proceeding to enforce the lien was prematurely brought. This contention is based on

Sec. 28 of the Mechanic's Lien Act of 1903, which provides that if a subcontractor has not been paid within ten days after service of the notice required by the act, he may either file a petition to enforce his lien, or sue the owner and contractor jointly for the amount due him. Under Sec. 34 of the act, the owner is entitled to ten days' notice of said claim. The contention is that the proceeding to enforce the lien was commenced even before service of said notice. If appellants can raise this question, yet, more than ten days elapsed after service of notice before the amended petition of June 28, 1912, was filed. It was in the power of the court to permit Anderson Brothers to intervene at any time during the pendency of the original proceeding. This question would not arise had they first sought such right on June 28th. It was by leave of the court that they amended and filed a new petition on that date. Their proceeding for enforcement of the lien, therefore, was, for all practical purposes, commenced at that time and appellants so regarded it, for they proceeded to take issue on said amended petition. It is merely a technical question, for no substantial right of appellants is affected nor have they any such interest in the property as entitles them to raise the question. The notice was for the benefit of the owners of the property, and they are not complaining and have assigned no cross-errors.

It is also claimed that because there was personal service of said notice on Theodore C. Mueller only, the decree erroneously provides for a sale of his wife's interest also. But of this we do not think appellants can complain. Under said act, the lien would attach to the lands and improvements jointly owned by husband and wife even though the contract was made with only one of them. (Sec. 3, Act of 1903.) Here it was made with both. Notice having been served on Theodore C. Mueller, it is not questioned but that the decree was good as to his interest. It would re-

quire the same amount to redeem from a sale thereof as it would from a sale of the interest of both owners. No greater burden is cast on appellants and no right of theirs being jeopardized, they have no ground for complaint.

We think all the requirements to establish the lien were proven, and that the decree should be affirmed.

AFFIRMED.

March Term, 1913, No.
17366
352 - 18366

A. C. McCLURG & COMPANY,
Appellee,

vs.

HERBERT O. TOMLINSON et al.,
Appellants.

Appeal from
Municipal Court
of Chicago.

186 I.A. 55

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the plaintiff (appellee), who sued defendants (appellants) for the purchase price of certain books sold and delivered to the latter, among which was a set of the works of Charles Dickens. Defendants claimed that plaintiff warranted such set to be a complete set of first editions of his published works. The claim was disallowed.

The contract of sale was in writing. It was embodied in four separate documents,- a letter to defendants from plaintiff's agent, George W. Chandler, written from London, July 6, 1909, describing the set in question, and stating the terms on which it could be had; an enclosure therewith from one of plaintiff's catalogues; a cablegram from defendants to Chandler, dated July 17, 1909, saying, "Buy Dickens and letters," and their letter of July 23rd, confirming the cablegram.

Much of the evidence bearing on the alleged breach of warranty was received on the theory that the contract was ambiguous. We do not think it was.

Prior to Chandler's visit to London to buy books for plaintiff, he had a conversation with defendants about rare books and first editions in which they at times dealt, and agreed to report as to sets he thought they could use. There is a disagreement as to the substance of the conversation; but whatever

it was, it was not admissible to explain a complete and unambiguous written contract, the intent and meaning of which is to be gathered from the entire contract, and in which, of course, all previous conversations relating to its subject-matter were merged. No authorities need be cited on such a fundamental proposition.

Nor was expert evidence as to the meaning of the words "complete set " necessary to an understanding of the contract. It contained no ambiguity, nor a warranty that the set sold was a "complete set of First Editions."

The letter of July 6th, so far as pertinent, reads:

> "I am pleased to report that I have found a set of First Editions of Dickens, 67 volumes in the original bindings as published. The titles and dates correspond with the set we had several years ago, a description of which we enclose herewith, cut from one of our catalogues. The set is in fine condition.
>
> * * * * *
>
> "Have secured an option on the set for two weeks. Will you therefore please cable me should you decide to have me buy and bind it for you - complete sets are exceedingly scarce and difficult to make up and I would strongly recommend you to let me secure this one for you. * * *"

The pertinent part of the 'cut' referred to reads as follows:

> "Dickens (Charles) Works, including his Life. Complete set of First Editions, with all the great number of clever illustrations, * * * 67 Volumes * * * sumptuously bound by Riviere in * * * levant morocco * * * nearly all the volumes with the original cloth or paper covers bound in at the ends. London, 1836-88. $2,000.00.
>
> The Set Comprises - - "

(Here follows a special description of each volume with details as to illustrations, binding, title, date of publication, etc.)

The only pertinent part of defendants' confirmatory letter reads, "I am sending this letter along as a confirmation of the cablegram, authorizing you to purchase for us the first edition of Dickens, sixty-seven volumes, to be bound by Riviere in red levant."

From the foregoing, it is perfectly clear that all Chandler represented he had found was a set of first editions of

Dickens in sixty-seven volumes, corresponding to the set described in the 'cut' as to titles and dates. The only purpose of sending the list was to inform defendants what was comprised in the set.

To be sure the writer of the letter expressed an opinion that "complete sets are exceedingly scarce," but he did not represent that the set in question was a 'complete set,' in whatever sense he may have employed the term, or that the sixty-seven volumes as listed constituted a complete set of first editions. While the cut from the catalogue, containing the list, refers to "complete set of first editions," nevertheless Chandler referred to it for no other purpose than to show the titles and dates of the volumes as there described. Defendants were not misled. By consulting the list, they could easily have determined what works of the author were included in the set offered to them. Whatever significance may be attached to the words "complete set" in other connections, here, if they have any significance other than a mere expression of opinion, they can be deemed nothing more than words of general description, referring to and controlled by the specific enumeration of the volumes in said list. (Hickok v. Stevens et al., 18 Vt. 111; State, ex rel. Mansfield v. Mayor of St. Paul, 34 Minn. 250.)

But as used we think they constituted a mere expression of opinion. It appears from the testimony that expert book-men differed as to their real significance. Defendants were not novices in the book trade or in dealing with rare and expensive editions of authors' works, and if the words had reference to the set as described in the list we do not think the letter can be regarded as asserting something of which they were ignorant or on which they relied. It will not stand the test of a warranty. (Adams v. Johnson, 15 Ill. 345; Kenner v. Harding, 85 id. 264; Roberts v.

Applegate, 153 id. 210.)

It is further claimed by defendants that in a conversation, after Chandler returned, he guaranteed the set to be a complete set of first editions. Chandler denied making any such statements; but, if made they were inadmissible, for a purchaser cannot avail himself of a parol warranty where the contract of sale is in writing, (Telluride Co. v. Crane Co., 208 Ill. 218; Robinson v. McNeill, 51 id. 225; Graham v. Eiezner, 28 Ill. App. 289) and if there was any such warranty given in a subsequent conversation, it would have required a new consideration to support it, and none was proven.

There was nothing about the proposition that was incomplete, uncertain or ambiguous. It needed no explanation to make its terms intelligible. It was a proposition on one side to sell certain specifically enumerated and described works of the author Dickens and an acceptance of it by the other, and we find no room therein for the contention by appellants that there was a warranty that it was a complete set of first editions of the author or that the goods delivered were not in accordance with the contract.

The judgment is affirmed.

AFFIRMED.

March Term, 1913, No.
356 - 19370

PEOPLE FOR THE USE OF JACOB GLOS, Appellant, vs. PETER B. OLSEN, County Clerk, et al., Appellees.	Appeal from Circuit Court, Cook County.

186 I.A. 57

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order sustaining a general demurrer to a declaration alleging a breach of the official bond given by Peter B. Olsen, as county clerk of Cook County. Many questions are discussed in the briefs which we do not deem it necessary to consider. Assuming for the sake of argument, that an action would lie on a county clerk's official bond for such breaches as plaintiff attempted to declare on, nevertheless, such count was insufficient in that it did not state facts from which the court could determine whether there was any breach of official duty.

Sixty-nine breaches are attempted to be set out in the declaration in as many counts. The first sixty-three are based upon the claim that the county clerk charged and collected excessive fees for the issuance of tax deeds and for recording the evidence upon which they were issued.

Section 222 of the Revenue Act provides:

> "County clerks shall record as evidence upon which deeds are issued the application, all affidavits and notices filed with the application, the certificate of sale, and all other documents and papers filed in compliance with law, and be entitled to the same fee therefor that may be allowed by law for recording deeds."

In no one of the counts is there alleged what amount or fee the county clerk could legally have required for recording such evidence. In the absence of such an allegation, it is impossible for a court to determine whether or not the fees required and al-

leged to have been paid were excessive. For that reason alone the demurrer to the first sixty-three counts was properly sustained.

The remaining six counts were based on the claim that in each deed issued on the affidavits required as a foundation therefor the county clerk included but a single parcel of land instead of several, thus causing an increased cost to the relator for record of the tax deeds in the recorder's office, and alleged that the relator, as applicant for the tax deeds, was entitled to have a certain number of lots included in each deed, but that the county clerk included in each only one lot or tract of land, and "that his acts and doings in that behalf were unlawful and oppressive." Such allegations were mere conclusions. There was no allegation of fact from which the court could infer whether more than one lot should have been included in a tax deed or not. For aught that appears the issuance of the deeds was strictly in compliance with the second proviso of Section 220 of the Revenue Act, which directs that the clerk shall include in a deed not to exceed one lot, etc., assessed and sold in one description, except in cases where such lot, etc., is owned by one party or person. There was no allegation to show that in any application by relator the facts presented brought the case within the exception referred to.

The judgment will be affirmed.

AFFIRMED.

March Term, 1913, No.

201 - 19303

CLARK W. HAWLEY, Appellee,	)	
vs.	)	Appeal from Municipal Court of Chicago.
E. O. McCORMICK, Appellant.	)	

186 I.A. 58

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

A recovery of judgment was had in this case by the appellee (plaintiff) against the appellant (defendant) upon an oral contract alleged to have been made by the plaintiff with the defendant wherein, as alleged, defendant agreed to pay or cause to be paid to the plaintiff the purchase price of certain lands bought by the plaintiff from a Mr. McDoel if plaintiff became dissatisfied with his contract.

It appears that the defendant had agreed with a Mr. Andrus that if the latter purchased certain lands from Mr. McDoel in California and afterwards became dissatisfied with his contract, the former would "take him out" of the deal, as we understand the record, either by taking the property himself or causing it to be taken by a corporation of which he was a stockholder and which was engaged in selling the McDoel tract of land.

The case of the plaintiff rests upon the testimony of Andrus, who stated that McCormick had made a similar agreement with him (Andrus) with respect to the property bought by Dr. Hawley, who was a friend of Andrus. McCormick denied ever having made such a contract as to the Hawley purchase, and stated that the reason for his making such an engagement as to the property bought by Andrus was that Andrus was an old friend of his and had been in ill health. It appears that Andrus became dissatisfied with his purchase and that McCormick relieved him of his

contract in accordance with the agreement. We find in the record no evidence upon the essential feature of the case, other than that of Andrus and McCormick which, as stated, was in direct opposition.

We think the judgment should be reversed for the erroneous admission of evidence with regard to the quality of the land. While in the second amended statement of claim it was stated that defendant represented to plaintiff that the land was suitable for apple orchards, this did not change the cause of action from one in contract to one in tort. An action for tort may not be brought in the Municipal Court where the amount claimed is more than $1,000, as in this case. The evidence was improperly admitted because if McCormick had made a contract with Hawley prior to the purchase by Hawley of the land, as claimed, it was entirely immaterial for what reason Hawley became dissatisfied and required repayment by McCormick. The evidence taken, which was considerable in amount, as to the kind of soil, etc., the alleged inability to raise apples on the land, was necessarily very harmful. It is true that evidence in rebuttal was offered and the plaintiff's witnesses cross-examined. The plaintiff, however, is not in our opinion supported in the proposition that this constituted a waiver of error by the defendant. The case is entirely unlike those cited in which the first evidence on the subject was offered by a party who complained because similar evidence was afterwards introduced by his adversary. The evidence being so nearly at least equally balanced, the jury might easily have been led astray by this evidence upon an issue not properly before it.

For the error pointed out the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1913, No. 18262

256-A-19283

L. FISH FURNITURE COMPANY,
a Corporation,
Appellant,

vs.

CHARLES R. HORRIE, trading as
RANDOLPH MARKET & GROCERY,
Appellee.

Appeal from
County Court,
Cook County.

186 I.A. 64

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought by the appellant (plaintiff) for $635, claimed to be the amount due from appellee (defendant) for a quantity of trading stamps. A special notice of defense was attached to the plea of the general issue and the affidavit of merits, in which it is said: "and further, defendant will give in evidence and offer to prove that he has never refused to pay plaintiff according to the terms of said contract and that he now does offer the said plaintiff the sum of one hundred and forty-five dollars, being the amount due to the plaintiff from the defendant under the terms of said contract," etc. Notwithstanding this admission of the amount due, the jury found a verdict in favor of the defendant, and judgment was entered in his favor for costs.

The contention of the defendant that the judgment should be affirmed seems to be based solely upon the proposition that defendant offered a check to the plaintiff for the sum of $145, which was refused by it because insufficient in amount. The alleged tender was not kept good by payment of the money into court or by an offer of it in open court or otherwise. The judgment must therefore be reversed and the cause remanded for a new trial.

We find it unnecessary to treat of other matters discussed in the briefs.

REVERSED AND REMANDED.

March Term, 1913, No.

310 - 19321

IDA M. HEATH, Appellee, vs. CITY OF CHICAGO, Appellant.	Appeal from Circuit Court, Cook County.

186 I.A. 65

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In this case judgment was obtained by appellee as plaintiff against the City of Chicago, appellant, as defendant, for personal injuries alleged to have been sustained by the plaintiff through the negligence of the City in maintaining a defective and dangerous sidewalk.

The grounds urged for reversal of the judgment are, that the verdict was against the manifest weight of the evidence; that the plaintiff was guilty of contributory negligence; that the court erroneously refused to submit two special interrogatories to the jury; that a proper instruction tendered by the defendant was refused, and that an improper instruction tendered by the plaintiff was given.

The accident happened on February 17, 1911, between 10:30 A. M. and 10:40 A. M., on the north side of Randolph street near Clark street in the city of Chicago. It is the contention of the plaintiff that the evidence shows that on December 13, 1910, the commissioner of public works issued a license to a contractor for the construction of a trapdoor in the sidewalk, which trapdoor was about that time placed therein; that the sidewalk at that point was of large stones, with openings cut in the same for coal holes; that in locating the frame for the trapdoor it was necessary to cut into and take out a square section of the stone sidewalk; that in order to close the part of the coal holes

which otherwise would be left open concrete was used; that on the day of the accident there was a hole in the sidewalk which extended from the rim of the trapdoor frame eighteen inches along the frame east and west, with a depth at the iron rim of the trapdoor of 3½ to 4½ inches; that at the time of the accident the sidewalk was crowded with people, which prevented the plaintiff from seeing the hole; that plaintiff stepped into the hole, fell and received very serious injuries. On the part of the City it is claimed that the sidewalk at the place in question was without defect and that plaintiff's injury was due to a mere accident.

We have carefully read the testimony in the record and are unable to say that the weight of the evidence with respect to the City's negligence is not with the plaintiff. Nor are we of the opinion that the plaintiff was not shown by the evidence to have been in the exercise of ordinary care at the time of the accident.

It is said that the court erred in refusing to submit to the jury the following interrogatories:

> "First. Was the accident occasioned proximately by a defective plan of construction of the place in question?
>
> "Second. Was the place of the alleged defect in the same condition on the 17th day of February, A. D. 1911, at the time of the accident as it was at the time of the construction?"

Neither of these questions related to an ultimate fact, and the refusal to submit them to the jury was not erroneous. The most that can be said of the interrogatories submitted is that they relate to merely facts that possibly might tend, more or less, to establish the ultimate facts upon which the rights of the parties depend. Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132; Chicago & Alton R. R. Co. v. Winters, 175 Ill. 293; Chicago City Ry. Co. v. Olis, 162 Ill. 514.

Two instructions tendered by the defendant are al-

leged to have been erroneously refused. The essential feature of each of these instructions was covered by an instruction which was given, and the refusal to give additional instructions on the same subject was not error. Nor are we persuaded that the two instructions complained of which were given on behalf of the plaintiff were erroneous.

It is next claimed that the damages are excessive. The amount of the verdict was $5,250. It is not denied that the plaintiff was seriously injured; her hip was broken and the femur fractured. There was evidence tending to show that the injuries will be permanent and that plaintiff will never be able to walk without the aid of crutches. Indeed, in the brief of the defendant there is no dispute as to the nature and extent of the injuries. We do not regard the verdict excessive in amount.

The judgment is affirmed.

AFFIRMED.

61 - 19047.

ALEXANDER FELMAN, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
BENJAMIN SCHIFF, doing business as SCHIFF & CO., Defendant in Error.	)	OF CHICAGO.

186 I.A. 67

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff in error sued the defendant in error in the Municipal Court, to recover $200 which the plaintiff deposited in defendant's savings bank, and which the defendant paid out by mistake to a man who had found or stolen the defendant's pass-book. Upon a trial before the court without a jury, the defendant had judgment and the plaintiff brings the case here for review. It appears that the plaintiff opened a savings account with the defendant in October, 1910, and was given a pass-book, upon the outside of which the following was printed in capital letters: "Take care of this book. If you should lose or mislay it notify us immediately." Upon the inside of the front cover, under the heading: "Rules Relating to Savings Deposits," three rules were printed, one of which is as follows:

> "PAYMENTS TO HOLDERS OF PASS-BOOKS.
> This bank shall not be liable for payments made to any person who shall produce the deposit book of the depositor, unless written notice shall have, previous to such payment, been given to the bank for or in behalf of the depositor that said book has been lost, mislaid, stolen or otherwise passed from the possession of the true owner thereof. Any depositor who shall prove to the satisfaction of this bank that his pass-book has been lost, stolen or destroyed, and shall furnish to the bank satisfactory indemnity against any claim which may at any time be made against the bank on account thereof, will receive, at or after thirty days from date of notice, the amount of this deposit or any part thereof, or a duplicate pass-book. The bank may make payments to the depositor without the production of such book."

At the top of the first page of the book the following sentence was printed: "All deposits are made subject to rules relating to savings." Under this statement were written the several amounts deposited and withdrawn, with the date stamped opposite each entry and the balances, written in words and figures. The book shows that during the year following the opening of the account, the plaintiff made deposits on twenty-eight different days and withdrew money on three occasions. The last deposit was made on October 14, 1911, after which the plaintiff's balance was $4.5. The plaintiff was an egg-candler, 25 years of age, and kept his bank book either in his pocket or in the drawer of a dresser in his room in a boarding house. On October 17, 1910, a man resembling the plaintiff presented the plaintiff's pass-book at defendant's bank, and asked for $300. He gave the name and address of the plaintiff, and signed the plaintiff's name to a "withdrawal card." As these apparently corresponded to the name, address and signature upon the "signature card" kept by defendant, the money was paid to him. The next day he came again and asked for the balance. Defendant requested him to "wait a minute." A moment later, he disappeared, leaving the pass-book in defendant's possession. Later the same day, the plaintiff discovered that his pass-book was gone, and upon notifying defendant of that fact, was told that $300 had been paid out as above stated. It was shown that the plaintiff had never given anyone authority to use his pass-book or draw money for him from the bank. The bank refused to pay him the $300, and this suit followed.

A number of propositions of law and fact were submitted to the trial court and marked "held" or "refused". From these propositions, it appears that the court found, as facts, that the amount in question had been withdrawn from the plaintiff's

account, by a person other than the plaintiff, without his knowledge, authority or consent; that the signature of the plaintiff, as signed by that person on the withdrawal card, is a forgery; that there is not such a marked dissimilarity between the forged signature and the genuine signatures of the plaintiff that a reasonably prudent person would have discovered the forgery by mere inspection and comparison of the signatures; and that the defendant was not guilty of negligence in paying out the money, under the circumstances shown by the evidence. The court also held, as propositions of law, that while the plaintiff was bound by the rules printed in his pass-book, yet it was the duty of the defendant to exercise vigilance in paying money to any person presenting the plaintiff's book, and that the fact that plaintiff was negligent is immaterial.

It is claimed that the burden of proof was upon the defendant to show that the plaintiff knew and understood the rules printed upon his pass-book, or that his attention was called to them and that he assented thereto. The plaintiff testified that he could not read English, that he had never read the rules and had never tried to read them. It appears, however, that the pass-book was in his possession for more than a year, that it had been frequently used by him during that time, in making deposits and obtaining withdrawals; that he spoke and understood the English language, and that he wrote his name in English characters, on the signature card and withdrawal cards. He admitted that he knew that he had to present the book in order to make deposits or to withdraw any money. As above stated, the trial court who saw and heard the witnesses, refused to find, from this evidence, that the plaintiff in fact had no knowledge of the rules printed in the pass-book. If it be conceded that the rule of law is as claimed by plaintiff's counsel, we would not be authorized to reverse the finding of the trial

court, sitting as a jury, in this respect, unless we were of the opinion, after an examination of the whole of the evidence, that the finding is manifestly contrary to the preponderance of the evidence. We are not of that opinion, and therefore it is unnecessary to decide whether the rule is, or is not, as claimed.

As to the legal effect of such rules, it is said, in Morse on Banks and Banking, Vol. 2, Sec. 320: "The regulations of a savings bank for withdrawing deposits, if properly made known to the depositor, are proof of the contract between him and the bank. They are intended for the protection of the bank and depositor against fraud and forgery, and it is generally held that such a regulation in the shape of a by-law enters into the contract of deposit, and binds the depositor. * * * One of the commonest rules is that the bank book must be produced in order to draw the deposit and that production of the book shall be authority to the bank to pay the person producing it. This is regarded as a reasonable and binding regulation, and if the bank pay to one having the book, there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good. * * * But the bank must exercise reasonable care." This statement of the law is supported, in whole or in part, by the following cases: Donlin v. Provident Institution for Savings, 127 Mass. 183; Chase v. Waterbury Bank, 77 Conn. 298; Rummel v. Germania Savings Bank, 127 N. Y. 488; Cosgrove v. Provident Institution for Savings, 64 N. J. L. 653; Gifford v. Rutland Savings Bank, 63 Vt. 108; Murrill v. Dollar Savings Bank, 92 Pa. St. 134; Moline State Savings Bank v. Liggett, 106 Ill. App. 323. Plaintiff's counsel does not seem to seriously dispute the doctrine thus stated, but upon the assumption that such is the law applicable to the facts of this case, he insists that the circum-

stances under which the $200 payment was made were such as to excite suspicion, and that therefore a payment under such circumstances without making further inquiry was negligence on the part of the defendant. The circumstances relied upon are (1) that the forged signature is (it is claimed) entirely different from the plaintiff's signature on the signature card, and (2) that the evidence is that the forger first asked for two dollars and when he found this request was going to be allowed, he asked for two hundred dollars. As to the latter circumstance, the evidence merely shows that when the imposter presented the pass-book, he was asked by the cashier how much he wanted, and he said "two"; that the cashier wrote the figure "2" in the pass-book, when the man said: "No, two hundred dollars;" that the cashier then wrote beneath the figure "2" the figures "100", asked him his name, address and other questions, then asked him to sign a withdrawal card, compared the signature with the signature card, and finally paid him the money. The cashier testified that the man who presented the pass-book resembled the plaintiff, was apparently about the same age and correctly answered the questions put to him. As to the other alleged suspicious circumstance, we have compared the signatures on the cards (which have been certified as part of the record) and we cannot say, from our examination, that there is any such marked dissimilarity in the signatures as to excite suspicion. No two of the signatures are exactly alike in all respects, yet four of them are admitted to be genuine. After due consideration of this evidence, in the light of the plaintiff's contentions, we cannot say that the finding of the trial court upon these questions of fact, is manifestly contrary to the weight of the evidence.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

124 - 19120.

(867)

NATHAN SLOAN, doing business as NATHAN SLOAN & COMPANY, for use of FIRST NATIONAL BANK OF CHICAGO, Defendant in Error,

vs.

BOSTON INSURANCE COMPANY, a corporation, Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

186 I.A. 81

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

In this case, the plaintiff brought suit against the defendant upon a fire insurance policy for $1,000. Plaintiff was a manufacturer of ladies' suits and cloaks, and occupied the seventh floor of a fire proof building on Market street, Chicago. He carried insurance amounting to $17,000 upon his stock of merchandise, represented by seventeen policies of $1,000 each, issued by different insurance companies. His statement of claim alleges that the property insured was destroyed by fire on December 6, 1910, whereby he sustained a loss of $24,083.04; that after the fire he made proofs of loss; that thereafter an appraisement of the amount of his loss was made by three appraisers appointed in accordance with the provisions of the insurance policy; that such appraisers fixed the sound value of the plaintiff's property at the sum of $11,550, and the loss and damage thereon at the same amount, but that defendant refused to pay the same. Upon a trial before a jury, a verdict was rendered for the plaintiff for $710.76, being one-seventeenth of $11,550, with interest; and from a judgment entered upon that verdict defendant brought this writ of error.

It appears from the appraisers' report that they stated the value of the property in two separate items. In the first item, the appraised value of "ladies' suits, skirts and jackets" was given, and in the second item the value of "furs and skins".

It is contended by defendant's counsel that the insurance policy does not cover furs and skins, for two reasons: first, that they are not described in the policy, and second, that plaintiff was not the sole owner of the same.

The property insured is described as follows in the policy: "$1,000 on stock of merchandise consisting chiefly of ladies' suits, skirts and jackets, manufactured and in process of manufacture, and all materials and supplies used in the manufacture of the same, their own or held by them in trust, or on commission, or sold but not removed from the premises, and on all labels, sample cases, packages and cases, all while contained in, on and attached to the basement fireproof building, and on and under sidewalks belonging thereto, situate Nos. 181 Market St., Chicago, Illinois." Among the general printed conditions contained in the policy is the following: "This entire policy, unless otherwise provided by agreement endorsed hereon or added thereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership."

It appears from the evidence that after the insurance policy was written, and about nine months prior to the fire, the plaintiff entered into a written contract with a dealer in furs and skins, under which goods of that character were to be shipped to the plaintiff and held by him "on memorandum", to be sold in the name of the dealer at a price fixed by him, and that the profits on such sales should be divided between them in certain proportions. The contract also required the plaintiff to keep all such property fully insured.

We think the trial court correctly instructed the jury that "The word 'merchandise', as used in the form of this policy, means all merchandise carried in stock by Nathan Sloan & Company, or Nathan Sloan, doing business as Nathan Sloan & Company, either owned or held in trust or on commission; and the insurance is not

limited to ladies' suits, skirts and jackets." The words "stock of merchandise" as used in the policy are broad enough to cover such furs and skins as were carried in stock by the plaintiff. The qualifying words, "consisting chiefly of ladies' suits, skirts and jackets", were evidently intended to characterize the general nature of the merchandise handled by the plaintiff, and not as a definite specification of particular articles or materials, to the exclusion of all others. The words "held by them in trust" were construed in Home Ins. Co. v. Favorite, 48 Ill. 238, as covering property that is not owned by the insured, but entrusted to him by others and which is in his possession at the time of the fire at the place described in the policy. By the agreement between the plaintiff and the dealer above mentioned, the plaintiff did not become the owner of the furs and skins shipped to him by the dealer. He was merely given the right to the possession of the same, as the factor or selling-agent of the dealer. The fact that the plaintiff's compensation for making sales was fixed at a certain proportion of the profits instead of a stated commission, did not make him a partner of the dealer, except, perhaps, as to the profits. It was the property that was insured, not the profits. It follows that the general clause in the policy as to unconditional and sole ownership must be construed as being qualified by the special provision covering property held by the plaintiff "in trust or on commission."

It is further contended that the evidence shows that the plaintiff wilfully and falsely stated the amount of his alleged loss; that he made false statements under oath when examined in relation to the same; and that he was guilty of such wilful fraud in these and other respects as to preclude a recovery. These are questions of fact which were submitted to the jury and their decision was adverse to defendant's contention. The defendant's motion for a new trial was overruled, however, and error is

assigned upon that ruling. This brings up the question whether the court erred in so ruling. "If a verdict is manifestly against the weight of the evidence, it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed." (Donelson v. E. St. Louis Ry. Co., 238 Ill. 428.)

The fire in the plaintiff's premises occurred a little after midnight. As nearly as we can ascertain from the evidence, the fire had burned possibly half an hour before an alarm was given, and was put out within five minutes after the firemen arrived. The evidence is practically undisputed that aside from effects caused by smoke, water and heat, the damage from the fire was confined to a space approximately 15 by 20 feet in area, near the center of the premises occupied by the plaintiff. The plaintiff testified that most of his stock was located "about the center" of the premises. The total area of the floor occupied by him was 30 by 90 feet, of which the front third was used as an office and salesroom, and the remaining two-thirds were used for factory purposes. The office was separated from the factory by a wooden partition about six feet high. The building fronts west and the fire started near the northwest corner of the factory part of the premises. In the factory were a number of sewing machines and cutting tables, and there were other tables and shelving upon which goods were piled. The fire consumed a small portion of the factory floor (about 2 by 4 feet in all), scorched the side walls and ceiling and one or two of the tables; but no part of the wooden partition was burned through, and not one of the tables was destroyed. The proofs of loss, as presented to the Insurance Company, began with the following item: "January 1, 1910, Inventory as per books, $15,994.79." To this item was added $52,639.83, as the total amount of "purchases as per bills and books", and "labor on

garments", from January 1, 1910, to the date of the fire. From the sum of these two items was subtracted the gross amount of sales during the same period, less ascertained profits and merchandise in possession of traveling men, leaving a balance called "Value of stock at time of fire, $25,731.21." To this statement of value was appended a "list of goods remaining in sight" after the fire, the original value of which is scheduled at $4540.38. When this claim was presented, the defendant's adjusters asked to see the plaintiff's books. The plaintiff submitted all his books for the years 1902 to 1909 inclusive, but submitted none for the year 1909, except the stubs of his check books. The adjusters asked to see his account books for 1909, but the plaintiff claimed they had been lost or destroyed. In the middle of one of the books submitted, the adjusters found a statement covering ten pages, headed: "Inventory from Order Book, July 10th, 1909", which apparently showed that on that date the plaintiff's total assets were $79332.28, and that he owed $30982.89, leaving a net balance of $48349.39. A copy of the main items of that inventory was made by the company's adjusters. Ten days later, the adjusters again asked to see the book containing that inventory. The book was produced, but in the meantime, the pages containing the inventory of July 10, 1909 had been cut out of it. The plaintiff was then examined under oath, in pursuance of the provisions of the policy. He denied all knowledge of the inventory of July 10, 1909, and denied all knowledge of the mutilation of the book. When the copy made by the adjusters was produced upon the trial, however, he claimed the entries cut out of the book were not intended as an inventory, but were merely some memoranda made by him for a different purpose. A computation was made by one of the company's adjusters, based upon these memoranda (treated as an inventory) and the stubs in the plaintiff's check books, cover-

ing the period from July 10, 1909 to January 1, 1910. This computation tends to show that if the missing memorandum was in fact an inventory (as it appears and purports on its face to be) and was correct at the time it was made, the value of the plaintiff's stock on hand on January 1, 1910 could not have been over half the amount stated by the plaintiff in his proofs of loss. If the missing inventory be assumed to be correct, and the computation of defendant's witness be accepted as accurate, then the amount fixed by the appraisers as the value of the plaintiff's stock on hand at the time of the fire, would seem to be approximately correct. On the other hand, if the proofs of loss, as submitted by the plaintiff, be accepted as true, then it follows, necessarily, that over $20,000 worth of ladies' suits, cloaks, furs and skins must have been so completely and utterly destroyed in a fire of less than an hour's duration as to leave no trace whatever "except sand and ashes", though the tables on which they were piled and a wooden partition, less than twenty feet away, were only scorched. This conclusion is so palpably absurd that even the plaintiff himself did not vouch for its truth upon the witness stand. When he was asked the direct question: "What became of the difference between $4040.34, being the sound value of the goods remaining in sight after the fire, and $24,721.21, which you say was the sound value of all the stuff before the fire", the plaintiff merely replied: "I presume it was destroyed by fire." It is not contended, nor could it be successfully claimed, under the facts of this case, that the mere fact that the appraisers reported the amount of the alleged loss of the plaintiff to be $11,000 prevented the defendant from proving that the plaintiff did not have on hand at the time of the fire and in his possession at the premises described in the insurance policy, the goods he claims were so completely and utterly destroyed. The agreement

under which the appraisers were appointed does not give to their report any such conclusive force or effect. It seems probable, however, that the jury may have acted upon some such erroneous assumption. After a careful examination of all the evidence in the record, we are unable to escape the conclusion that the verdict is manifestly contrary to the weight of the evidence. We are of the opinion that the trial court erred in overruling the defendant's motion for a new trial, and for that reason the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

123 - 19,119.

186 I.A. 82

NATHAN SLOAN, doing business as NATHAN SLOAN & COMPANY, for use of FIRST NATIONAL BANK OF CHICAGO, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT OF CHICAGO.
QUEEN INSURANCE COMPANY OF AMERICA, a corporation, Plaintiff in Error.	)	

186 I.A. 82

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This case is controlled by the decision in Sloan v. Boston Insurance Company, Gen. No. 19,120. It was tried by stipulation upon the same record as in that case, except that the loss sued for was claimed under another one of the seventeen policies referred to in the opinion in that case. This case was submitted to the court for trial without a jury and was tried by the same judge who presided at the trial in the former case. For the reasons stated in that opinion, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

402 - 19895.

MARTIN J. BROWN, Appellant,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
EDWARD M. BROWN, Appellee.	)	COOK COUNTY.

186 I.A. 88

MR. PRESIDING JUSTICE PITCH

ANNOUNCED THE DECISION OF THE COURT.

This is a motion by appellant to transfer this appeal to the Supreme Court, upon the ground that a freehold is involved. It appears from the transcript that appellant filed her bill in the Circuit Court of Cook County, praying for a divorce on the grounds of cruelty and adultery. It is also alleged in the bill that after her marriage to appellee, appellant bought with her own money certain described real estate: that it was understood and agreed at that time that the conveyance should be made to appellant alone, but that, without her knowledge and consent, appellee wrongfully, secretly and surreptitiously, "and for the purpose of appropriating to himself a right and interest in said real estate to which he was not entitled", caused the agent of the vendor to insert in the deed of conveyance the name of appellee as a grantee jointly with appellant, and a warranty deed was executed in that manner, and recorded before appellant was aware of that fact: that she had no knowledge that such was the fact until the deed was returned to her from the recorder's office: that thereupon she demanded that appellee release and convey to her his apparent interest in such real estate, but that appellee refused to do so and has ever since continued to hold the same wrongfully and illegally. To these allegations was appended a prayer for a decree requiring appellee to release and convey all interest in

said real estate to appellant. Appellee answered the bill, denying the charges of cruelty and adultery and the charge of fraud as to the real estate, but admitting that the real estate was purchased with appellant's own money. Upon the hearing before the chancellor, evidence was introduced by appellant tending to prove the averments of her bill of complaint. The Circuit Court held the proof insufficient, dismissed the bill for want of equity, and the complainant perfected an appeal to this court. Here, the appellant has assigned as errors the action of the Circuit Court in refusing appellant a decree of divorce and also in refusing to require appellee to release and convey to appellant all interest in the real estate described in the bill of complaint.

In Moomb v. Moomb, 238 Ill. 556, it was held that this court has no jurisdiction to hear and determine an appeal in a divorce case, if it appears that a freehold is directly involved. In that case a decree of divorce was entered, which also directed one of the parties to convey certain real estate to the other. It is urged by appellee's counsel that under section 17 of the Divorce act (Rev. Stat. Ill., Chap. 40), such a decree can only be entered in a divorce proceeding when a divorce is granted; and it is pointed out that in this case, no divorce was granted; hence, it is said, no freehold is necessarily involved. The jurisdiction of the Circuit Court to hear and determine the issue raised as to the title to the real estate in question, does not depend on the Divorce act. The pleadings in this case present two distinct issues, one whether appellant is entitled to a divorce, and the other, whether she is entitled to a decree for a reconveyance of the real estate. No demurrer was filed by appellee. The issues were joined and the parties went to trial upon both issues. In one of such issues, a freehold was directly involved, and the decree disposed of both.

For this reason, a freehold is necessarily involved.

It is also suggested that by praying and perfecting an appeal to this court and assigning errors which this court has jurisdiction to determine, appellant has waived or abandoned all questions relating to the freehold. Such is undoubtedly the rule which obtains after the case has been argued and submitted for decision to this court. Poe v. Ulrey, 253 Ill. 60, 61; Mennett v. Villiard, 279 Ill. 332; Town of Scott v. Artman, 337 Ill. 400; Houren v. C.N.&St.P. Ry. Co., 238 Ill. 620, 628; Millers Fire Ins. Co. v. People, 170 Ill. 474; Case v. City of Sullivan, 242 Ill. 56, 62. In this case, however, appellant has made his motion before any briefs or abstracts have been filed in this court. We are of the opinion that, under these circumstances, section 102 of the Practice Act makes it our duty to transfer the cause to the Supreme Court; and it will be so ordered.

TRANSFERRED TO SUPREME COURT.

SAMUEL MARKS and JACOB H. MARKS, doing business as H. MARKS' SONS,
Defendants in Error,

vs.

IKE WILLIAMS and RUBY WILLIAMS, doing business as J. WILLIAMS' SONS,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

186 I.A. 90

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error by this writ seek to reverse a judgment rendered against them for $184 in the Municipal Court of Chicago in an action of the fourth class tried by the court without a jury. The claim of the plaintiffs in the trial court was for damages for the alleged wrongful conversion by the defendants of 18 tons of scrap iron of the value of $10.25 per ton.

After the transcript of the record was filed in this court the defendants in error entered their appearance and filed a written motion to strike from the record the "alleged bill of exceptions" and to affirm the judgment, which motion was denied. They have not, however, seemfit to file any brief or argument in answer to the points here raised by counsel for plaintiffs in error.

On the trial in the Municipal Court only three witnesses testified, - the plaintiff, Jacob H. Marks, and both defendants, and certain writings were admitted in evidence. It appears that the plaintiffs were dealers in scrap material in the City of Chicago; that on July 6, 1911, they obtained permission from the Baltimore and Ohio Chicago Terminal Company (hereinafter referred to as the Company) "to unload a wagon load of steel girders" on the vacant property of the Company at Center avenue and 18th street in said city, plaintiffs informing the Company at the

time that they intended in "about 10 days" to ship said girders over its road; that said girders were there unloaded and at that time, according to the testimony of Jacob H. Marks, weighed 18 tons and were of the value of $10.85 per ton; that said girders were not thereafter moved by plaintiffs at any time and were not thereafter seen by Jacob H. Marks, except on one occasion about a month after they had been deposited on the property of the Company; that on March 19, 1912, the Division Engineer of the Company wrote defendants, who were also dealers in scrap material in Chicago, that there was a considerable quantity of "scrap" on the property of the Company at said location which the Company desired to sell to the highest bidder, and requested that defendants make a bid for the material; that defendants inspected the material, which they found consisted of steel girders, and offered the Company the sum of $30 therefor; that on April 2, 1912, the Company sold the girders to the defendants receiving from them the sum of $50; that the defendants thereafter had said girders broken up into small pieces while on the property of the Company in order that the same "might more easily be carried away"; that on May 6, 1912, the defendants commenced to carry away said broken material from the premises and convey the same to the defendants' premises; that two wagon loads were so conveyed; that when the third wagon load was so being conveyed Jacob H. Marks happened to see the contents of said wagon and immediately notified defendants that said material belonged to plaintiffs; that this was the first intimation that defendants received that plaintiffs claimed ownership of the material so purchased by the defendants from the Company, and that defendants retained possession of said material and refused to pay plaintiffs any sum whatsoever therefor.

It further appears from the testimony of both of the defendants that said material contained in said three wagon loads was weighed upon its arrival at defendants' premises and that the total weight was six tons. While the plaintiff, Jacob M. Marks, testified that the girders, when they were deposited on the property of the Company on July 6, 1911, weighed 16 tons and were of the value of $10.25 per ton, there was no evidence introduced by the plaintiffs contradicting said testimony of the defendants that the weight of the broken girders, so carried away on May 6, 1912, was six tons.

The trial court in his finding assessed plaintiff's damages at $164. It is apparent that the court considered that defendants had converted 16 tons of the material owned by plaintiffs. We are of the opinion that the finding of the court as to amount is not supported by the evidence and that the judgment entered on the finding is excessive and can only be sustained to the amount of $61.50. If, therefore, plaintiffs within ten days shall file a remittitur of $102.50, the judgment will be affirmed for $61.50; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

JOSEPH UNGAR, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
E. F. SNYDACKER, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error E. F. Snydacker, defendant in the trial court, seeks to reverse a judgment for $82 rendered in favor of Joseph Ungar in the Municipal Court of Chicago upon the verdict of a jury.

About June 18, 1911, plaintiff was employed by defendant to make certain alterations on the latter's house at Kenilworth, Illinois. According to plaintiff's version he was to be paid at the rate of $4 per day for every day that he worked on the job. He says he was paid up to and including July 20nd, but that for the days he worked subsequent to that time, and up to August 25th, he was not paid. His claim was for labor performed for 20 1/2 days at $4 per day, amounting to $82, and also for the sum of $2.61 for certain mosquito netting purchased for defendant at the latter's request. According to the defendant, it was verbally agreed between the parties that plaintiff was to perform the labor required for making said alterations, that for this labor of plaintiff and an assistant the defendant was to pay a sum not exceeding $40 per week, that the defendant was also to pay for all materials, that the maximum sum to be paid by defendant for all necessary labor and materials was $750, and that plaintiff was to receive any difference between said $750 and the total amount paid by defendant for said labor and materials. The defendant filed a set-off claiming that said alterations actually cost him the sum of $962.78 and that plaintiff was indebted to him in the sum of $212.78. Plaintiff denied that he ever made

any agreement to complete the alterations for $750 or any other fixed sum.

The only point here made in the brief of counsel for defendant is that the verdict is against the manifest weight of the evidence. We have carefully examined the testimony of the several witnesses and the exhibits. We do not think any useful purpose will be served in discussing the evidence, which we find conflicting. We deem it sufficient to say that, in our opinion, the verdict is not manifestly against the weight of the evidence. Accordingly, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

Term, 1913, No.
188 - 19118.

EMIL A. OETTINGER, Defendant in Error,	)	ERROR TO
v.	)	MUNICIPAL COURT
J. LEVIT, Plaintiff in Error.	)	OF CHICAGO.

186 I.A. 104

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 13, 1912, a judgment by confession for $135 for commissions and $25 attorney's fees, or for the total sum of $140 and costs of suit, was entered in the Municipal Court of Chicago against J. Levit, defendant, and in favor of Emil A. Oettinger, plaintiff. The warrant of attorney, signed by the defendant, appeared on the same sheet of paper immediately below an application for a real estate loan, also signed by the defendant. The application was dated June 1, 1912, and was addressed to "Citizen's Realty & Investment Co., (Unincorporated)" under which trade name the plaintiff then did a real estate and brokerage business in the City of Chicago. By said application the plaintiff was authorized by defendant, inter alia, to negotiate and procure for defendant a loan of $4500 on certain property of the defendant situated in Chicago, and defendant agreed to pay all charges and expenses for the examination of the abstract of title, for recording all papers, for perfecting the title, or for any other purpose incident to the making of the loan; and defendant further agreed to pay plaintiff a commission of 5 per cent. on the amount of said loan, (viz: $135) "when the said loan is accepted."

Subsequent to the entry of the judgment, on October 7, 1912, the defendant appeared and moved the court to vacate the judgment, supporting the motion by an affidavit signed by himself. The motion was denied.

On October 24, 1912, the defendant made a second motion to vacate said judgment, supporting this motion by the affidavits of himself and of one of his attorneys. The affidavit of said attorney was to the effect that while plaintiff had procured a license from the City of Chicago as a real estate broker for the year expiring December 31, 1911, he had no such license on June 1, 1912, or at any time during the year 1912. The defendant's affidavit was to the effect that he had no knowledge or any reason to believe that said judgment of July 15, 1912, had been entered against him until he was so informed on October 1, 1912, when he employed an attorney, etc.; that he had no knowledge of ever having signed any warrant of attorney to confess any judgment in favor of plaintiff and that if his signature was subscribed to such an instrument it was so subscribed on the representation of plaintiff that said instrument was an application for a loan and nothing more; that while he read the application for said loan before signing it, he is not well versed in the English language, particularly with legal documents; that he signed said instrument on the representations of plaintiff that the same was merely an application for a loan and that he relied upon those representations; that said loan was never made nor was a tender of the loan ever made to defendant by plaintiff; that at the time defendant signed said application, on June 1, 1912, plaintiff, at defendant's request, signed and delivered to defendant a writing as follows: "It is hereby understood that if by the 15th of June, 1912, we decide not to accept your loan we will on request return to you or cancel your application received this day;" and that defendant was not notified that any loan could be procured through plaintiff within 15 days of the making of said application.

On a motion to set aside a judgment by confession, where the affidavits filed in support of the motion show, prima facie, a good defense on the merits, it is the duty of the court to permit an issue to be formed and the debtor to present his defense, leaving the judgment to stand in the meantime as security. (Gordon v. Besse, 88 Ill. 159; Farwell v. Huston, 151 Ill. 239; Dumford v. Felmar, 157 Ill. 288; Nees v. Dusbauld, 143 Ill. App. 497; Hood v. Gehrs, 170 Ill. App. 530.) In the present case we think that the affidavits filed by the defendant in support of his motion showed, prima facie, sufficient cause for opening the judgment. A real estate broker, doing business in the City of Chicago and not having a license as such broker, cannot recover commissions. (Eckert v. Collot, 48 Ill. App. 381; Whitfield v. Huling, 50 Ill. App. 179; Braun v. City of Chicago, 110 Ill. 186.) And where it appears by affidavit that the note, upon which the judgment by confession was entered, was executed in the belief that some other document, not a judgment note, was actually being signed, leave to plead should be allowed upon due application. (Murphy v. Schoch, 135 Ill. App. 550, 552; Funk v. Hossack, 115 Ill. App. 340; Anderson v. Field, 6 Ill. App. 307, 310.)

It further appears from the document contained in the transcript, entitled "Stenographic Report" and duly certified by the trial judge, that on November 23, 1912, defendant's motion to vacate said judgment came on to be heard upon said affidavits, then read to the court, and upon oral testimony. Then follows in said stenographic report of the proceedings the testimony of a witness named Kelly, a clerk in the city clerk's office, called on behalf of defendant, as given on direct and cross-examination. His testimony was to the effect that the plaintiff, Emil A. Oettinger, was licensed as a real estate broker during the year 1911, that he was not so licensed at any time during the year 1912, but that the "Citizens' Realty & Investment Co." was so

licensed for said year, 1912. Then follows the testimony of the plaintiff, called as a witness on his own behalf, as given on direct and cross-examination. His testimony was to the effect that he did business in the year 1912 as a real estate broker under the trade name of "Citizens' Realty & Investment Co., (Unincorporated)"; that for the year 1912 he had a license to do business as a real estate broker under said trade name; that no one but himself did business or attempted to do business as a real estate broker during said year under said license; that his license for the year 1911 was in his individual name; that he applied and paid for a renewal of that license for the year 1912; that the City returned to him a license for said year but under said trade name instead of under his individual name; that shortly after the receipt of said license he called at the office of the city clerk and requested that said license be issued in his individual name, as formerly, but that he was there informed by one of the deputy clerks that under the circumstances it was unnecessary to make any change in the license and that "I let it go at that, because it is the same thing anyway." It does not appear that the defendant, at the time plaintiff was called as a witness to testify or at any time during his examination, objected to his counter-testimony on the ground that the same was improper upon the hearing of a motion to vacate said judgment, or that if said motion was granted the defendant desired a trial of the issues by a jury, or made any objections whatsoever to plaintiff testifying as a witness.

It further appears from said stenographic report that at the conclusion of plaintiff's said testimony the further hearing was postponed until December 7, 1912, on which date the trial was resumed, both parties being present with their attorneys; that a witness named Rohm testified on behalf of plaintiff and was cross-examined; that plaintiff further testified on his own

behalf and was cross-examined; that no objection whatsoever to their testifying was made by defendant; that the defendant and one of his attorneys testified at considerable length on defendant's behalf and both were cross-examined; and that at the conclusion of the testimony and after arguments of counsel the court overruled defendant's motion to vacate said judgment.

It is first contended by counsel for defendant that the trial court erred in permitting the introduction of the counter-evidence of the plaintiff, as to the merits, on the hearing of a motion to vacate the judgment. On the hearing of such a motion, where the motion is supported by affidavits of the defendant, the rule is that it is improper for the court to consider, over objection, counter-affidavits controverting the defense to the judgment on the merits. (Gilchrist Co. v. Northern Grain Co., 204 Ill. 510; Mendell v. Kimball, 86 Ill. 582; Hood v. Gehrs, 170 Ill. App. 250.) The reason for the rule is that, if the affidavits show prima facie a meritorious defense to the judgment, the defendant is entitled to have the issue passed upon by a jury. (Gilchrist Co. v. Northern Grain Co., supra; Hood v. Gehrs, supra.) And where the motion is supported by evidence heard in open court instead of by affidavits, the rule also is that it is improper for the court, over objection, to hear counter-evidence. (Birtman Co. v. Thompson, 156 Ill. App. 421, 427; McCormick v. Loomis, 168 Ill. App. 214, 217.) But, in our opinion, where as here it appears that, on a motion made in the Municipal Court in a fourth class case to vacate a judgment by confession, counter-evidence to the case made by the defendant is heard by the court, without any objection whatsoever being made by the defendant to such action, and the hearing is in fact treated by both parties as if a formal order had been entered by the court opening up the judgment, and a full hearing on the merits is

actually had, the fact that the trial court failed to enter a formal order opening the judgment, and at the conclusion of said hearing ordered that defendant's motion to vacate said judgment be denied, does not warrant this court in reversing said last mentioned order and remanding the cause for a trial on the merits. Such a trial has already been had, participated in by the defendant without objection, and the merits of his case fully considered by the court and decided adversely to him.

As to the question whether or not, under all the evidence, the judgment entered against the defendant should stand, no point is here made by counsel for defendant that the warrant to any attorney of any court of record to confess the judgment was not actually signed by the defendant, or that the attorney who confessed the judgment did not have apparent authority so to do, or that the amount for which the judgment was entered, including the attorney's fees, was too large. The only points raised on the merits in the trial court, and here raised, are (a) that plaintiff was not a licensed real estate broker and therefore could not recover any sum from defendant as commissions for negotiating the loan applied for, (b) that defendant's signature to said warrant of attorney was obtained by the fraudulent representations of the plaintiff, upon which the defendant relied, and (c) that the said loan applied for was never made nor was a tender of the same made to the defendant by plaintiff within the proper time.

As to the first of these contentions we think the evidence sufficiently shows that at the time the application was signed, and during the entire year of 1912, the plaintiff was a licensed real estate broker. It is true the license for said year was issued in the name of the "Citizens' Realty & Investment Co. (Unincorporated)", the trade name under which plaintiff did business, but it also appears that plaintiff himself paid for that

license, that no one but himself did business under it, and that he endeavored, shortly after it was received by him from the City, to have the same issued in his individual name but that his request was refused.

And, in our opinion, the evidence was not sufficient to warrant the court in holding that the signature of the defendant to said warrant of attorney was obtained by the fraudulent representations of the plaintiff which were relied upon by the defendant, or that the defendant, when he signed the application and the agreement to pay commissions, in which was contained said warrant of attorney, was not sufficiently versed in the English language to understand the meaning of the papers, which he testified he read over before signing.

As to the next contention, the evidence discloses that about the time the application for said loan was signed the plaintiff requested the Home Bank & Trust Company to make said loan to defendant; that said company after examination of the abstract and of the property agreed to make said loan and so notified plaintiff and was at all times after, to-wit: June 12, 1912, ready and willing and able to make said loan to defendant; that about June 13th plaintiff advised defendant that the loan had been accepted and requested defendant to call and sign the necessary papers; that defendant called on plaintiff about June 20th and refused to take the loan, and refused to sign the papers which had already been drafted, and that subsequently defendant accepted a loan on the same property from another party.

Our conclusion is that under the facts of this case the trial court did not err in entering the order overruling defendant's motion to vacate said judgment, and the order will, accordingly, be affirmed.

AFFIRMED.

AMANDA JONES, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
ANTON JONES, Appellant.	)	COOK COUNTY.

186 I.A. 106

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 5, 1911, Amanda Jones, complainant, filed her bill of complaint in the Circuit Court of Cook County against her husband, Anton Jones, defendant, a resident of the city of Chicago, alleging in substance that on June 8, 1898, she was lawfully married to the defendant and continued to cohabit with him as his wife until January 26, 1903, when she left him without fault on her part and refused longer to live with him; that she was compelled to leave him because of his cruel and inhuman treatment of her, his habitual drunkenness, and his adultery, and because of his having communicated to her a venereal disease, from the effects of which she has ever since suffered; and that the child of said marriage, Florence Jones, now about thirteen years of age, is in her care and custody. The bill prayed for separate maintenance, the custody of said child, alimony and solicitor's fees. The defendant filed an answer, in which he admitted said marriage and cohabitation, but denied the other material allegations of the bill, and further denied that complainant was a proper person to have the care and custody of said child. The defendant also filed a cross-bill in which he alleged, inter alia, that on said January 26, 1903, the complainant wilfully deserted him without any just cause and still persists in such desertion, and prayed for an absolute divorce and the custody of said child. The complainant answered said cross-bill, and both bills were put at issue, and a full hearing on both bills was had in open court

before the chancellor, without a jury, and on October 7, 1914, the court entered a decree for separate maintenance in favor of complainant, in which it was provided that she should have the care and custody of said child, that the defendant should pay for her support and the support of said child the sum of $10 per week, and also the sum of $50 for solicitor's fees, and that the defendant be restrained from visiting complainant's home and from interfering with her affairs or with said child, and from selling, assigning or incumbering his property, etc. The defendant by this appeal seeks to reverse the decree.

It is contended by counsel for defendant that the decree is contrary to the evidence. We have carefully read all of the evidence heard by the chancellor in open court, as contained in the certificate of evidence signed and sealed by the judge. While the testimony of the complainant is flatly contradicted by that of the defendant on material points, we think that her testimony, taken in connection with the other testimony introduced in her behalf, sufficiently sustain the allegations of her bill, and that the findings and decree of the chancellor are not manifestly against the weight of the evidence. The chancellor had the opportunity of seeing the several witnesses, hearing them testify and observing their manner while upon the witness stand. And the finding of a chancellor in a suit for separate maintenance, where the witnesses have been examined orally in open court, will not be disturbed on appeal unless the evidence clearly preponderates against it. (Porter v. Porter, 184 Ill. 398, 400; Johnson v. Johnson, 128 Ill. 510, 514: Schriner v. Schriner, 195 Ill. App. 191, 193.)

And we do not think that under the facts of this case the court erred in allowing the sum of $50 for solicitor's fees, as contended by counsel. Neither do we think that the court, in

admitting in evidence the affidavit of Doctor Matthei over the objection of counsel for defendant, committed such an error as warrants a reversal of this case.

The decree of the Circuit Court is affirmed.

AFFIRMED.

March Term, 1913, No.
182 - 19186.

FERDINAND C. NIEMEYER, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
GUST BERG and JOSEPH BRABEC, Plaintiffs in Error.	)	OF CHICAGO

186 I.A. 107

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 13, 1913, Ferdinand C. Niemeyer commenced an action of the fourth class in the Municipal Court of Chicago against Gust Berg and Joseph Brabec. According to the original statement of claim the action was in contract and for the recovery of the sum of $150, which sum it was claimed had been paid by plaintiff to Brabec and delivered by Brabec to Berg, and which sum of right belonged to plaintiff. After both defendants had entered their joint appearance and had filed an affidavit of merits signed by Brabec in behalf of both defendants, plaintiff obtained leave to change the form of action from contract to tort and filed a statement of claim in tort, and it was ordered that defendants' original affidavit of merits stand as an affidavit of merits thereto. In this statement of claim in tort plaintiff averred, in substance, that on June 4, 1912, the defendants pretended to assign to the plaintiff a certain lease, then existing between the defendants as lessor and lessee, of the premises known as No. 3738 Sheffield avenue, Chicago; that the lessor (Berg) represented that it would be necessary for plaintiff to deposit $150 as security for the payment of the last two months' rent under said lease, which expired on April 30, 1913, before he would accept the plaintiff as such assignee, knowing at the time that the defendant, Brabec, had previously assigned said lease to a certain Brewing Company; that by reason of said false and fraudulent representations plaintiff paid to

the defendant, Urabec, said sum of $150 as security for said last two months' rent, and that said lease had not been and never was assigned to the plaintiff; that on October 28, 1914, plaintiff was dispossessed of the premises; that at said time he was not indebted to said defendant Just Berg, and that since his said dispossession the wife of the defendant, Urabec, has been in the possession of said premises.

From the clerk's transcript of the record it appears that the case was tried before the court without a jury, and that on January 30, 1915, the court found "the defendant guilty in manner and form as charged in plaintiff's statement of claim", and assessed plaintiff's damages "at the sum of $150 in tort", and that on the same day the court adjudged that the plaintiff "have judgment on the finding herein and that the plaintiff have and recover of and from the defendant the damages of the plaintiff amounting to the sum of $150 in form as aforesaid assessed, together with the costs by the plaintiff herein expended, and that execution issue therefor." It nowhere appears that at any time the cause was dismissed as to either one of the defendants.

From the stenographic report of the proceedings at the trial, signed by the trial judge and contained in the transcript, it appears that plaintiff was the only witness in his behalf and that while he was on the stand four written instruments were identified by him and introduced in evidence; that at the conclusion of plaintiff's case counsel for defendants moved the court to find the issues for the defendants, which motion was denied; and that thereupon each of the defendants testified and were cross-examined at length.

After careful consideration we have reached the conclusion that the judgment must be reversed and the cause remanded for another trial, and, therefore, we refrain from a discussion of the evidence.

The gist of the plaintiff's claim, as disclosed by his second statement of claim, was that because of false and fraudulent representations plaintiff was induced to part with the sum of $150, for which he never received any consideration and which sum had not been repaid to him, by reason of which he was damaged. Even in an action of the fourth class in the Municipal Court a party is limited in his evidence to his claim as made, or as amended. In this case no amendment to plaintiff's original claim in tort was at any time made. In Walter Cabinet Co. v. Russell, 250 Ill. 416, 420, it is said: "The object of rules requiring statements of claim and of set-off is to inform the parties of the nature of the respective claims, and while the formalities of pleading have been abolished by statute, it is still the law in the Municipal Court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim and the evidence must be limited by that statement. The issue cannot be enlarged by oral claims or affidavits filed in the case." Under the evidence in this case, in our opinion, no sufficient proof was made by plaintiff of false and fraudulent representations made to him by either of the defendants such as would warrant a finding and judgment against either defendant.

And the judgment cannot stand for another reason. The action was in tort against two defendants. One might be found guilty and the other not guilty. The court found "the defendant guilty in manner and form as charged in plaintiff's statement of claim." And the court entered judgment against the "defendant" for the sum of $150 and costs. It is uncertain which one of the two defendants was found guilty and against which one the judgment was rendered. Where there are two defendants, and the ver-

dict as recorded is against "the defendant", without naming him, such verdict "is clearly insufficient to support a judgment against both, and as it fails to show which of the defendants was convicted and which acquitted, it is equally insufficient to support a judgment against either." (Lambert v. Borden, 10 Ill. App. 648, 650; Woolf v. Deahl, 152 Ill. App. 337, 340.) No reason is perceived why the same rule should not be applied where, in an action in tort against two defendants tried by the court without a jury, the finding of the court as recorded is against "the defendant", without naming him. We think the present case is to be distinguished from the cases of Bacon v. Schopflin, 186 Ill. 122, 132; West Chicago Street R. Co. v. Horne, 187 Ill. 250, and Knefel v. Daly, 91 Ill. App. 321, 324. In Bacon v. Schopflin, supra, it is said (p.132): "There are cases, where a verdict, returned for the 'defendant', instead of the 'defendants', has been held to be defective; but these cases proceed upon the ground that the defendants are severally, as well as jointly, liable, and, therefore, by the terms of the verdict, it would be uncertain which one was found to be guilty."

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

210 - 19215.

HOWARD N. WAGG, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
ROBERT A. STACY, Defendant in Error.	)	OF CHICAGO.

186 I.A. 109

MR. JUSTICE CHIDLEY DELIVERED THE OPINION OF THE COURT.

On August 19, 1912, Howard N. Wagg, plaintiff, commenced an action of the fourth class in the Municipal Court of Chicago against Robert A. Stacy and Mrs. Robert A. Stacy, his wife, defendants, to recover the amount claimed to be due on two promissory notes, a copy of one of which notes is as follows:

> "$300. Chicago, June 8, 1898.
> On or before Oct. 18, 1898, after date we promise to pay to the order of Howard N. Wagg three Hundred dollars, at Chicago. Value received with interest at 7 per cent. per annum.
> G. P. Stacy,
> Robert A. Stacy
> Frances H. Stacy."

The other note was for the same amount, of the same date, similarly signed, and was also payable to the order of plaintiff "on or before Dec. 18, 1898." On the back of each note appeared the following: "August 21, 1908. Received on the within note Twenty-five Dollars ($25)". The defense of Mrs. Stacy was that she was not a co-maker of either of the notes and during the trial the suit was dismissed as to her. Robert A. Stacy did not deny the execution of the notes. His defense was, as disclosed from his affidavit of merits, that the cause of action was barred by the statute of limitations. (Sec. 18, Chap. 83, Hurd's Stat. Ill.) It was contended by plaintiff on the trial that the evidence showed that on August 21, 1908, the sum of $50 was paid on the two notes to plaintiff by G. P. Stacy, a co-maker with the defendant Robert A. Stacy,

that said payment "was subsequently acquiesced in and ratified by said defendant", and that, therefore, said payment stopped the running of the statute and started it running anew as of said date as to said defendant, thus giving the plaintiff the right to commence and maintain an action against said defendant for the overdue balance at any time before August 31, 1918. The case was tried before the court without a jury, and the court found the issues against the plaintiff and entered judgment against him for costs. Plaintiff by this writ of error seeks to reverse the judgment.

It appears from the testimony of Robert A. Stacy, in substance, that he has resided in the city of Chicago since 1880; that his father, said C. P. Stacy, died in July, 1903; that he did not authorize any one to make a payment on said notes and has no knowledge of such a payment having been made on said notes on August 31, 1903, as claimed; that plaintiff never at any time asked him to pay either of said notes; and that in the year 1908 he received a communication from a representative of plaintiff, which was the first intimation he had that anybody wanted him to pay said notes.

The plaintiff testified in rebuttal, in substance, that on August 31, 1903, "fifty dollars was paid me on the two notes" by said C. P. Stacy; that the endorsements on each note sued on were made by plaintiff in his own handwriting; that subsequently in the early spring of 1908 he (plaintiff) had a talk with Robert A. Stacy on a train en route from Battle Creek, Michigan, to Chicago; that only Stacy and himself were present at that conversation; that "I told Stacy that his father, C. P. Stacy, had paid me $50 on the notes, and he said he was glad to hear it, and he hoped he (the father) would pay all of it, and he thought that he (the father) would pay all of it now, as he (the father) was better situated than he had been"; that this was

about all that was said in regard to the notes; and that he (plaintiff) did not at that time ask Robert A. Stacy to pay anything on the notes. The defendant, in sur-rebuttal testified, in substance, that while he recalled having a general conversation on the train with plaintiff, he did not recall any such conversation as stated by plaintiff, and that "I don't remember of discussing the note and the payment with Mr. Wagg."

After careful consideration of all the evidence, contained in the transcript before us, we cannot say that the finding of the trial court is contrary to the evidence or that the judgment is contrary to the law, as here contended by counsel for plaintiff. (Hallenbach v. Dickinson, 100 Ill. 427; Lowery v. Bear, 32 Ill. 382; Davis v. Mann, 42 Ill. App. 301; Robinson v. Briscoe, 68 Ill. App. 131; Lash v. Rozarth, 70 Ill. App. 196.) Counsel cite the cases of Granville v. Young, 86 Ill. App. 147; McDonald v. Weidner, 103 Ill. App. 390, and Adams v. Douglas, 140 Ill. App. 318, but in each of those cases, as we read them, the facts appear to be different from the facts as disclosed in the present record.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

811 - 18982.
18982

JOSEPH STUDER, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
CHICAGO, LAKE SHORE & SOUTH BEND RAILWAY COMPANY, Appellant.	)	COOK COUNTY.

186 I.A. 110

STATEMENT OF THE CASE. This is an appeal by the appellant (hereinafter called the defendant), Chicago, Lake Shore & South Bend Railway Company, from a judgment rendered against it in favor of the appellee (hereinafter called the plaintiff), Joseph Studer, for $15,000, in the Circuit Court of Cook County, in an action on the case. The declaration as originally filed contained two counts, but the second count was dismissed before the trial of the case. The remaining count charged in substance that, on October 27, 1910, the defendant operated and controlled a certain line of railroad running in a northerly and southerly direction, through the town of Indiana Harbor, Indiana, and upon and along a certain street or public thoroughfare in said town known as Euclid Avenue; that the defendant owned, operated and managed certain electric cars upon and along said railroad; that it was the duty of the defendant to use all proper care not to injure persons or property in the lawful use of the street or highway along which said cars were operated; that it was the duty of the defendant to approach intersections and crossings with their said cars under control, so as to be able to avoid injuring persons lawfully using said streets over which said cars ran; that it was the duty of the defendant, before approaching said crossings or intersections, to give signals of the approach of said cars, so that persons on the street or highway would have notice of the approach of said cars; that on the date last mentioned, the plaintiff was the owner of two certain horses, to-

gether with a two horse wagon, said wagon being loaded with meat, all of the value of $750; that on the last mentioned date, the plaintiff was driving his said horse and wagon along 139th Street, and at a point where same intersects with Euclid Avenue, in the town of Indiana Harbor, Indiana, and while in the exercise of all due care and caution for his own safety and for the safety of his said horses and wagon, and just before reaching said intersection, he stopped his said team, looked in both directions and listened, but saw nor heard no car or cars coming in either direction, as there was no warning or signal given of the approach of any car and seeing nor hearing no car, and while still looking and listening, plaintiff proceeded to drive across said Euclid Avenue, upon which avenue said railroad runs at grade: that before he could get across said tracks on said Euclid Avenue, one of the defendant's cars, being in the control and management of defendant's servants, was so carelessly, negligently and unskillfully operated and managed, and was running then and there at a high, dangerous and unlawful rate of speed, and giving no warning of its approach to said intersection, ran into, against and collided with plaintiff's said wagon with great force and violence, breaking said wagon and injuring one of the said horses, throwing plaintiff to and upon the ground, greatly to the injury of the plaintiff, in that his right foot was badly crushed and his left foot was severed, and he was greatly hurt and bruised about the body and made lame, sick, etc.: that as a result of said accident, he has been greatly and permanently injured and will be deprived of a large sum of money which he could have earned had he not been injured as aforesaid; that his ability to earn money has been greatly impaired if not totally destroyed: that he has suffered great and excruciating pain, and that he has been damaged to the extent of $30,000.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant has argued at great length, two propositions: (a) that the finding of the jury that the plaintiff was not guilty of contributory negligence is manifestly against the weight of the evidence: (b) that the verdict of the jury is manifestly against the weight of the evidence. These two propositions can be considered together. The theory of the defendant, as to the evidence, was that the defendant's motorman was propelling his car northward in and along Euclid Avenue and that the plaintiff was driving his team along the same street and in the same direction; that the car was then going at the rate of from fifteen to twenty miles an hour; that the motorman sounded his whistle before he reached 140th Street, the street just south of 139th Street, the place of the accident; that at the same time he sounded the whistle he turned off the power on his car, so that he might be able to stop the car, in case the plaintiff drove his team across the railroad track at 139th Street: that he kept the power off until he saw the plaintiff go beyond the point at 139th Street where teams ordinarily turned to cross the railroad track at that street: that assuming from this conduct of the plaintiff that he was not going to cross the railroad track at 139th Street, the motorman again put on his power, and that just thereafter the plaintiff, without looking to see if a car was coming, suddenly turned his team to the right and upon the railroad track; that the moment the motorman saw the plaintiff do this he "threw the air in emergency" and did all he could to stop the car: that repeated blasts of the whistle were blown before the car reached 140th Street and between 140th Street and 139th Street. The theory of the plaintiff, as to the evidence, was that he was driving north on Euclid Avenue, towards 139th Street, in a large wagon heavily loaded with meat; that it was

a cold, windy day; that the wind was from the southwest and it was blowing dense smoke that issued from a steam roller standing at 140th Street and Euclid Avenue across the railroad track at that point; that as he approached 140th Street he stood up and looked in both directions to see if there was a car coming; that he could see along the railroad track as far south as 140th Street, but no further, on account of the dense smoke from the steam roller at that place; that as far as he could see to the south, there was no car coming; that as he reached the south line of 140th Street he made a big, wide turn before approaching the tracks; that from the place of the turn to the tracks was 15 or 16 feet; that the tracks were four or five inches above the level of Euclid Avenue, and that there was no grade up to the track to drive on, and that he had to hold a tight rein on his horses and pay close attention to them in driving up to and over the track or he would have "gotten stuck with his team"; that after he made the turn and before he reached the railroad track, he continued to look in both directions for cars; that he saw none coming; that the horses and the front part of the wagon got over the railroad track, and the hind wheels of the wagon were on the track when the car hit the wagon; that the force of the collision was so great that the wagon was knocked a distance of 45 feet, and that it then struck a trolley pole with such force that it broke the pole off about two or three feet above the ground; that portions of the wagon and contents were found 150 to 200 feet away from the point of the collision; that the car ran a distance of 145 feet after the collision before it stopped; that the car gave no signal of any kind of its approach to 140th Street; that it was running at a speed of from thirty to forty miles an hour; that the motorman did not check the speed of his car as it approached the crossing in question, and that he did not have the car under control at any time as he approached 140th Street.

It would serve no useful purpose for us to enter into an extended analysis of the evidence. Both theories, as to the manner of the accident, find support in the testimony. The jury, with far better opportunities than we to judge of the credibility of the witnesses and the weight of the evidence, by their verdict, found that the plaintiff's theory of the accident was sustained by the weight of the evidence. The able and experienced judge who presided at the trial has approved the verdict of the jury. After a careful examination of the evidence we feel assured that we cannot say that the verdict of the jury is manifestly against the weight of the evidence. It follows from this conclusion that neither of the two propositions advanced by the defendant can be sustained.

The defendant complains of the refusal of the court to give the following instructions:

> "The plaintiff is presumed to have seen whatever was within the range of his vision and to have heard whatever was within the range of his hearing, and if you find from the evidence that the plaintiff looked at a point or place where he could have avoided the collision before he drove upon defendant's tracks, and that the car was within his range of vision, then the law presumes he saw what he might have seen; and if you find from the evidence that the whistle on the car was sounded in such a manner as to be within plaintiff's range of hearing, and the plaintiff listened, then I instruct you that the law presumed that the plaintiff heard what he might have heard."

> "It is the duty of a traveler in a public street of a city on which is being operated a street railway, to use his senses of sight and hearing, and to observe what he sees and to heed what he hears. It is not sufficient for the plaintiff to prove that he looked, if he did not observe what was within his range of vision, or to listen if he did not heed what he heard. The law presumes that he saw what was within his range of vision, and to have heard what was within his range of hearing. Such a person who fails to hear or see what he might have heard or seen by the exercise of ordinary care, and by such failure proximately contributed to his injury, is guilty of contributory negligence, and cannot recover."

It is not an accurate statement of the law of this State to say without qualification, that a man is presumed to have seen whatever was in the range of his vision and to have heard whatever was in the range of his hearing. Whether such a presumption arises depends upon circumstances. (The Chicago & N.W. R. Co. v. Dunleavy, 189 Ill. 182, 180; The Elgin J. & E. R. Co. v. Lawlor, 229 Ill. 321, 327.) The two instructions in question are also open to the further objection that they are argumentative in form. Counsel for the defendant contend, however, that as the accident happened in Indiana, the law of that State must govern, and that under the law of Indiana, the two refused instructions stated correct propositions of law and should therefore have been given by the court. If the law of Indiana on the subject in question differs from the law of this State it was incumbent upon defendant to prove that fact, and the proof on this subject must appear like any other proof in the bill of exceptions. As there is no evidence in the bill of exceptions in support of the contention of counsel, we must presume that the law of Indiana applicable to the instructions in question is the same as that of this State. (Chumasero v. Hilbert, 24 Ill. 293; Morris v. Wibaux, 160 Ill. 327; Hakes v. The National State Bank of Terre Haute, 164 Ill. 273; The Dunning System v. LaPointe, 113 Ill. App. 409.) The court, therefore, properly refused the two instructions.

The court gave to the jury, at the instance of the plaintiff, a stock instruction on the question of damages, and the defendant complains that the instruction allowed the jury to award damages for an element of damages as to which there was neither pleading nor proof. We find no merit in this contention.

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

ANNA SELINSKI, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
JOHN E. HOLLAND, Appellant.	)	COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was an action on the case, brought by the appellee (hereinafter called the plaintiff), Anna Selinski, against the appellant (hereinafter called the defendant), John E. Holland, to recover damages for personal injuries alleged to have been received by the plaintiff in a collision with defendant's automobile, on December 21st, 1908, at or near the intersection of Washington boulevard and Kedzie avenue, in Chicago, Illinois. The jury returned a verdict finding the defendant guilty and assessing the plaintiff's damages at $800: judgment was entered on the verdict and this appeal followed.

The plaintiff did not file a brief in this case, and this fact has increased the labor of this court in passing upon the merits of the appeal. The defendant has assigned a number of reasons why the judgment of the Superior Court of Cook County should be reversed. We find no merit in any of the assignments - save one. The defendant claims that the trial court erred in denying defendant's motion to set aside the verdict of the jury. Defendant contends that the finding of the jury that the plaintiff was not guilty of contributory negligence at the time of the accident is manifestly and clearly against the weight of the evidence, and that it was the duty of the trial judge, under the circumstances, to set aside the verdict and to grant the defendant a new trial, and that the failure of the trial court to do this is error for which the judgment must be reversed.

If the record sustains the contention of the defendant, then, undoubtedly, under the rule announced by our Supreme Court, the trial court erred in refusing to grant a new trial in the case. (Lonelson v. East St. Louis Ry. Co., 235 Ill. 528.) We have, with great care, examined the evidence, and while we are satisfied that the evidence for the plaintiff, when considered by itself, is clearly sufficient to sustain the verdict, we are none the less satisfied that when all the evidence in the case is considered together, the finding of the jury that the plaintiff, at the time of the accident, was in the exercise of ordinary care for her own safety is clearly and manifestly against the weight of the evidence. In passing upon the weight of the evidence, we have given full force and effect to the fact that the jury and the trial court saw and heard the witnesses and had far better opportunities than we to pass upon the credibility of the witnesses and the weight that should be attached to their testimony.

The defendant asks that we reverse with a finding of facts, but we do not think that this is a case in which the power of the Appellate Court to make a finding of facts should be exercised. We cannot say that it is clear that there can be no recovery in the case which this court would permit to stand; neither can we say that this is a case where a recovery would be merely a perversion of justice. (Borg v. C.B.I.&P. Ry. Co., 182 Ill. 364, 368; City of Spring Valley v. Coal Co., 175 Ill. 406.)

For the error of the trial court in overruling the motion of the defendant for a new trial, the judgment of the Superior Court of Cook County must be reversed and the cause remanded.

REVERSED AND REMANDED.

ber Term, 1912. No.

524 - 19143.

WILLIAM L. O'CONNELL, ADAM J. KASPER, NICHOLAS STREIT and CITY OF CHICAGO, Defendants in Error,	)	186 I.A. 113
vs.	)	ERROR TO CIRCUIT COURT COOK COUNTY.
CATHERINE S. FAY, JOHN ESTEN COOKE, Jr., ELIZABETH B. COOKE, PAULINE H. COOKE, H. BRENT COOKE, Jr., SALLIE W. COOKE, LYDIA W. COOKE MACKLIFFE, THOMAS FAY, JOHN ESTEN COOKE and H. BRENT COOKE, Plaintiffs in Error.	)	186 I.A. 113

STATEMENT OF FACTS. In 1907 the South Park Commissioners instituted proceedings to condemn two lots on the southwest corner of Princeton avenue and forty-fifth street in the City of Chicago. The jury returned a verdict fixing the value of the two lots at $[illegible].26, and the value of the improvements on the two lots at $2400. The Park Commissioners, in 1908, paid the total award for the lots and improvements into the hands of the County Treasurer of Cook County. A dispute arose as to the ownership of the fund, and on July 8, 1908, the County Treasurer filed a bill of interpleader in the Circuit Court of Cook County, making all the claimants of the fund parties to the proceedings. Two of the defendants, Nicholas Streit and Frederick H. Streit were defaulted for failure to file answers.

Adam Streit filed an answer claiming to be the owner of a leasehold for an unexpired term under a lease to him of a storeroom in the building on the premises made on March 8, 1904, by the defendant Frederick H. Streit, and running five years to March 8, 1909; the answer alleges that the jury in the condemnation proceedings fixed the value of this leasehold at $350.

Adam J. Kasper answered that the County Clerk of Cook County, Illinois, on May 16, 1900, executed and delivered to Frederick H. Streit a tax deed conveying to said Streit the lots in question, which tax deed was recorded on May 26, 1900; that thereupon said Streit went into possession of said property; that on, to-wit, the 10th day of January, 1905, said Streit, by the name of Fred H. Streit, and Caroline M. Streit, his wife, conveyed the property in question to Kasper by quit claim deed, which deed was recorded on January 13, 1905; that beginning with the taxes and assessments due for the year 1899, the said Streit, and subsequently this defendant, paid all taxes and assessments levied against the said lots; that from the time the title to said property was acquired by the said Streit, the said Streit, and subsequently this defendant, were in continuous possession of said property until this defendant was dispossessed by said South Park Commissioners under the condemnation judgment; that of the sum of $5,918.25 held by the complainant for the benefit of the owners and parties interested in the above property in question, he is entitled to the sum of $5,536.25, being the amount awarded to the owners or parties interested in the property, less the sum found by the jury to be the value of the leasehold interest in the property; prays that a decree be entered directing the complainant to pay to him the sum of $5,536.25.

Catherine A. Fay and Thomas Fay, her husband, answered that in 1893, George E. Cooke was the owner in fee simple of the premises in question and that in that year he died testate at Louisville, Kentucky, leaving a will by which he gave a life estate in an undivided one-half of the land to each of his two sons, John Esten Cooke and H. Brent Cooke, with remainder to the children of said two sons per capita and not per stirpes; that thereafter, said sons conveyed their life estates in said

lots by quit-claim deeds to Catherine S. Fay, who is still the owner of said interest, and claims to be entitled to receive the value of said life estates out of said fund; Thomas Fay admitted that he has no interest in the premises in his own right.

John Esten Cooke and H. Brent Cooke set up the same facts as are contained in the answer of Catherine S. Fay; they admit that they have sold and conveyed their interest to Catherine S. Fay and claim nothing out of the fund in question. The other Cookes answered that they are the children of John Esten Cooke and H. Brent Cooke, and that under the will of their grandfather, George E. Cooke, they are the owners of the remainder after the expiration of the life estates owned by Catherine S. Fay and that they are entitled to the whole of the fund in question after the present value of the life estates belonging to Catherine S. Fay is deducted. Evidence was taken before the chancellor on May 5, 1910, on the bill and the aforesaid answers. The case was then taken under advisement, and thereafter the chancellor announced a decision to the effect that Kasper had failed to show title in himself and that Mrs. Fay and the Cookes were entitled to the entire fund. The defendant Kasper then filed an amended answer on June 1, 1911, alleging that on May 16, 1900, the County Clerk of Cook County, executed and delivered to Frederick H. Streit the lots in question, which said tax deed was recorded on May 22, 1900; that thereupon the said Streit went into possession of said property; that on January 10, 1905, said Streit, by name of Fred H. Streit, and Caroline M. Streit, his wife, conveyed the said property to the defendant in error by quit claim deed, recorded on January 13, 1905; that beginning with the taxes and assessments due for the year 1899, the said Streit, and subsequently the defendant in error, paid all taxes and assessments levied against the said lots; that from the time

the title to said property was acquired by the said Streit, the said Streit, and subsequently the defendant in error, were in continuous possession of said property until the defendant in error was dispossessed by the South Park Commissioners under the condemnation proceedings; that Nicholas Streit was the owner of all the buildings and improvements on the said lots and for which the jury in the condemnation case returned a verdict of $2,690 for said buildings and improvements; that said Nicholas Streit on July 21, 1900, gave a chattel mortgage to the defendant in error to secure an indebtedness of $3,500, conveying and assigning to the defendant in error all his right, title and interest to all of said buildings and improvements on said lots, which said chattel mortgage was acknowledged and recorded; that subsequently said Nicholas Streit assigned all his right, title and interest to said buildings and improvements and to the condemnation fund and judgment to the defendant in error; that Nicholas Streit constructed said buildings and improvements on said premises and at all times owned the same as personal property and invested large amounts of money in said buildings and improvements and that the defendant in error is now entitled to the value of said buildings and improvements as assessed by said jury and said court; that of the sum of $8,916.85 held by the complainant for the benefit of the owners and parties interested in the property, he is entitled to the sum of $2,690 for buildings and improvements on said lots, and also the sum of $3,226.25 for the value of said lots.

After the filing of the amended answer by the defendant in error Kasper, the court heard further evidence and thereafter entered a decree containing in part the following:

The court finds that on the issues made by the amended answer of Adam J. Kasper and the answers herein of the other defendants, the equities as to the sum of $2,690 are with the de-

fendant, Adam J. Kasper, and the equities as to the remainder of said sum are with the defendants, John Esten Cooke, Jr., Elizabeth N. Cooke, Pauline M. Cooke, H. Grant Cooke, Jr., Sallie W. Cooke, Lydia W. Cooke Wickliffe and Catherine S. Fay.

The court further finds that Nicholas Streit occupied said premises under leases from George N. Cooke, the owner of said property, the lease on said Lot 1 being dated October 18, 1890, and the lease on said Lot 2 being dated February 1, 1892; that under and by virtue of said leases said Nicholas Streit owned whatever buildings and improvements he placed upon said premises as his personal property with the right to remove the same; that subsequently while occupying said premises under said leases said Nicholas Streit constructed the buildings and improvements upon said premises and expended money in the construction and repair of the same, which said buildings and improvements remained upon said premises and were upon said premises at the time the jury in the condemnation suit above referred to assessed the same as being of the value of $2,690; that the said Nicholas Streit on the 21st day of July, 1900, for a good and valid consideration transferred said buildings and improvements by chattel mortgage to the defendant, Adam J. Kasper, and that said chattel mortgage in fact operated as an assignment and sale of all the right, title and interest of the said Nicholas Streit to the defendant, Adam J. Kasper, and that subsequently a written assignment and bill of sale of said premises was executed by the said Nicholas Streit to the defendant, Adam J. Kasper, of all of said buildings and improvements on Lots 1 and 2 above described, for which the jury in said condemnation suit assessed the value of $2,690; that the said defendant, Adam J. Kasper, at the time of said condemnation suit was the owner of all of said buildings and improvements and was entitled to the sum awarded for said buildings and improvements on said Lots 1 and 2

by said jury in said condemnation suit; that said Adam J. Kasper was entitled to $2,490 of the fund paid into the hands of the County Treasurer by the South Park Commissioners in said suit for the value of said buildings and improvements on said lots, and is now entitled to the same; that said defendant, Catherine S. Fay, is entitled to receive out of the sum of $7,234.25 assessed as the value of said Lots 1 and 2 by the jury in said condemnation case, the value of the life estates of H. Brent Cooke and John Eaton Cooke at the date of said condemnation, and said defendants, John Eaton Cooke, Jr., Elizabeth B. Cooke, Pauline M. Cooke, H. Brent Cooke, Jr., Sallie W. Cooke and Lydia W. Cooke Wickliffe, are each entitled to receive one-sixth of the remainder of said sum of $3,886.25 after deducting the value of the interest of said Catherine S. Fay; that the said defendants, Catherine S. Fay, John Eaton Cooke, Jr., Elizabeth B. Cooke, Pauline M. Cooke, H. Brent Cooke, Jr., Sallie W. Cooke and Lydia W. Cooke Wickliffe, have in open court stipulated between themselves that the court need not determine the value of said interests separately, but may award the said fund to them jointly.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out by Catherine S. Fay and the Cooke heirs to reverse that part of the decree that awards $2880 to the defendant Kasper.

The sole question at issue in this case is whether the defendant in error, Kasper, or the plaintiffs in error, Catherine S. Fay and the Cookes, are entitled to that portion of the fund awarded by the jury in the condemnation proceedings as the value of the improvements on the two lots in question. It is now conceded by the defendant in error, Kasper, that the part of the decree that gives to the plaintiffs in error the value of the land is correct. The chancellor awarded to Kasper the value of the improvements, and the plaintiffs in error have sued out this writ to reverse this portion of the decree and they claim that they are entitled to the value of the improvements, and that the decree in this respect should be reversed with directions to the chancellor to award to them the value of the improvements.

The case first came on for hearing before the chancellor on May 8, 1910. In their sworn answer the plaintiffs in error claimed that they had the legal title to the property, and that they were entitled to the entire fund in the hands of the County Treasurer. The defendant in error, Kasper, in his sworn answer, claimed the entire fund (save the amount of $300, the value fixed by the jury in the condemnation proceedings of the alleged leasehold interest of Adam Streit in the premises in question), on the grounds that he had a fee simple title to the property by color of title under the Limitation act. In his answer Kasper alleged that Frederick A. Streit went into the possession of the premises on May 18, 1900, and that from that time said Streit was in possession of the premises until January 10, 1908; that

on that date Kasper, under a quit claim deed from said Streit, went into the possession of the premises and retained possession of the same until the South Park Commissioners took possession under the condemnation proceedings. When the case was reached on the trial call, the counsel for Kasper would not consent to an immediate trial of the cause until the counsel for the plaintiffs in error stipulated that Frederick H. Streit, if present, would testify that he (said Streit) acquired his tax deed on May 16, 1900, to the premises in question for a good consideration and without collusion with anybody, and that he was in possession of the premises from said date until he quit claimed the same to Kasper on January 10, 1905, and that he (said Streit) delivered the possession of the premises to Kasper on said date, and that Kasper was in continuous possession thereafter until the South Park Commissioners took possession under the condemnation proceedings. Counsel for Kasper admitted in open court that if the limitation title of Kasper failed, the plaintiffs in error had the legal title to the property. During the hearing of the evidence, counsel for Kasper also made the following admission: "If my tax deed is not good, that is, if my color of title, seven years payment of taxes and possession is not good, we haven't any defense to this action." Both sides at this hearing regarded the improvements as part of the realty. It was condeded that Nicholas Streit was at one time in possession of the property in question under two written leases from George E. Cooke. One of these leases expired on February 1, 1897, and the other on November 1, 1898. It was further conceded that after the expiration of the said leases, Nicholas Streit remained in possession of the premises as a tenant from year to year, until he abandoned the premises. The defendant in error, Kasper, contended that said Streit abandoned the premises some time prior to May 16, 1900. The plaintiffs in

error insisted that the said Streit abandoned the pre ises in December, 1899. On the hearing Kasper introduced in evidence a lease dated March 8, 1904, from Frederick H. Streit to Alan Streit of "the storeroom situated on the southwest corner of 48th street and Princeton avenue, known as 4800 Princeton avenue." One of the witnesses to this instrument is Nicholas Streit. By his action in witnessing this lease, Nicholas Streit, in effect, acknowledged that he was no longer in possession of the premises. Frederick H. Streit, the lessor in this lease was actively engaged at this time in an effort to create a title to the premises hostile to that of the plaintiffs in error; but, however suggestive this action of Nicholas Streit in witnessing the said lease may be, we must assume that it was not a collusive act, because of the positive statements of the two Streits and Kasper that Frederick Streit took and maintained possession of the premises without collusion with anybody.

The alleged right of Kasper to the fund was predicated entirely upon the claim that the plaintiffs in error had abandoned the premises some time prior to May 18, 1900 - the date that Kasper asserts that Frederick H. Streit took possession of the premises. To maintain this claim, Kasper was, of course, compelled to assert and prove that Nicholas Streit, the former tenant of the plaintiffs in error, had abandoned the premises prior to the last mentioned date. The plaintiffs in error conceded the contention of Kasper that Nicholas Streit abandoned the pre ises prior to May 18, 1900 - in fact, they claimed that his abandonment took place at a much earlier date.

Kasper attempted to show a title to the premises under the seven years Limitation act. In this he failed. The chancellor, after a lengthy consideration of the pleadings and the proof, decided that the plaintiffs in error had the legal title to the premises, and that they were entitled to the entire fund.

It is now conceded by Kasper that the plaintiffs in error had the legal title to the real estate involved in the condemnation proceedings.

After the chancellor had decided adversely to Kasper, Kasper filed an amended answer on June 1, 1911. This answer was sworn to by Kasper. It will be noticed that in the amended answer Kasper reasserts his claim to the entire fund under the alleged limitation title. In addition he asserts that Nicholas Streit was the owner of the improvements on the lots in question, for which the jury in the condemnation proceedings fixed a valuation of $2800; that said Streit, while a land tenant, constructed said improvements on said premises, and that he owned the same as personal property; that the said Streit on July 21, 1900, gave a chattel mortgage to Kasper (to secure an indebtedness of $2500) conveying and assigning to Kasper all his right, title and interest to all of said improvements on said lots; that subsequently said Nicholas Streit assigned all his right, title and interest in said buildings and improvements and to said condemnation fund and judgment to Kasper. This answer of Kasper in effect asserts that Nicholas Streit abandoned the premises in question prior to May 14, 1909. Under the new allegations in the amended answer Kasper claims that the improvements in question were personal property; that they belonged to Nicholas Streit and that he had the right to dispose of these improvements after he abandoned the premises.

On June 24, 1911, the case came on for further hearing before the chancellor on the amended answer of Kasper. At this time Kasper introduced a chattel mortgage from Nicholas Streit and wife to Kasper. This mortgage is dated July 21, 1900. It covers a large amount of personal property, and it also includes "one two-story frame building with store floor and the barn (frame), situated in the rear of the same, both located on leased ground

at No. 4800 Princeton avenue, Chicago." The consideration fixed in the chattel mortgage is $5000. Kasper also introduced a bill of sale from Nicholas Streit and wife to Kasper of the buildings and improvements upon the premises in question and "also all the sums of money awarded by the jury in the judgment of the court in the condemnation proceedings, and all the interest that they may have in the verdict and judgment." This bill of sale was dated May 29, 1911. It will be noted that this instrument was not recorded until the day after the amended answer of Kasper was filed. It will also be noted that Nicholas Streit, the grantor in this bill of sale, was defaulted in this case. Nicholas Streit, who was called as a witness by Kasper, testified that he sold out the business he was conducting on the premises in question to his brother Adam Streit on March 8, 1899, and that the said Adam Streit conducted the business after that time and that he (Nicholas Streit) moved out of the buildings in December, 1899; that he did not lease the buildings to Adam Streit; that Adam Streit remained in possession of the buildings from 1899 until 1907; that no one paid him (Nicholas Streit) any rent for the premises at any time after he vacated the same; that Adam J. Kasper is his brother-in-law. The witness further testified that he never made any assignment of his interest in the buildings and improvements in question, except the chattel mortgage of July 21, 1900, to Kasper and the bill of sale of May 29, 1911 to Kasper. By way of impeaching this statement, the plaintiffs in error introduced a bill of sale from Nicholas Streit to Frederick H. Streit, dated August 1, 1900, conveying "the two story frame building and all the sheds and barn, known as 4800 Princeton avenue, situated on lot No. 1, block 3."

From the sworn pleadings and from the evidence in the case, it clearly appears that Nicholas Streit abandoned the premises and the buildings and improvements thereon some time

prior to May 16, 1900. According to the testimony of Nicholas Streit, the abandonment took place in December, 1899. This statement is apparently uncontradicted in the record.

The court, in its decree, finds that the buildings and improvements in question were placed upon the premises by Nicholas Streit; that he paid for the same and that he had the right to remove the same; that the chattel mortgage from Nicholas Streit to the defendant Kasper, dated July 21, 1900, was for a good and valuable consideration, and that it in fact operated as an assignment and bill of sale of all the right, title and interest of the said Streit in the buildings and improvements to the defendant Kasper. It will be noted that the decree (adopting the theory of Kasper's amended answer) assumes that the abandonment of the premises and improvements by Streit had no legal effect on his alleged ownership of the improvements.

Counsel for Kasper at the second hearing insisted that the improvements on the premises were trade fixtures, and for the purpose of the argument we may concede the correctness of this contention. The material question for us to decide is: Was Nicholas Streit the owner of these so-called trade fixtures on July 21, 1900, when he gave the chattel mortgage to the defendant Kasper? In the view that we have taken of the case, we may assume that this chattel mortgage operated as a bill of sale, as contended for by the counsel for Kasper.

In speaking of the tenant's right of removal of trade fixtures and the time in which the right of removal may be exercised, the writer of the article on "fixtures" in the American & English Encyclopedia of Law, 2nd Ed., Vol. 13, page 640, says: "The tenant's right of removal must, it is said, be exercised during the term, or before he surrenders possession on the expiration of his lease." "'The decisions all agree that whatever fixtures the tenant has a right to remove must be removed

before his term expires, or at least before he quits possession; for, if the tenant leaves the premises without removing them and the landlord takes possession, they become the property of the landlord. The tenant's right to remove is rather considered a privilege allowed to him than an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it afterwards, because the right to possess the land and the fixtures as a part of the realty, vests immediately in the landlord; and although the landlord has no right to complain, if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture or notice to quit, he has a right to consider them as a part of his property.' To same effect see 1 Wash. on Real Prop. 20; Ewell on Fixtures, 157." Donnelly v. Thieben, 9 Ill. App. 480. Trade fixtures become annexed to the real estate, but the tenant may remove them during his term, but if he fails to do so, he cannot afterwards claim them against the owner of the land. Dreiske, et al. v. Peoples Lumber Co., 107 Ill. App. 288; Taylor's Landlord and Tenant, 9th Ed., Vol. 2, p. 176.

As it is absolutely clear from the evidence that Nicholas Streit, when he made the chattel mortgage to Kasper on July 21, 1900, had long since abandoned the premises in question and the buildings and improvements thereon, it follows from the authorities cited that Nicholas Streit was not the owner of the so-called trade fixtures at the time of the making of the chattel mortgage to Kasper. Hence Kasper acquired no title to the trade fixtures by, or on account of, said instrument. The so-called trade fixtures, under the authorities cited, became the property of Mrs. Fay and the Cookes when Nicholas Streit abandoned the property.

The final contention of counsel for Kasper is: "that the tenant, Nicholas Streit, held over after the expiration of the leases (from Cooke to Streit) and was a tenant from year to year: * * * the tenant, Nicholas Streit, after having made a sale of the improvements to defendant in error, while he was holding over from year to year, and while the improvements were his own, could not prejudice the rights of the vendee, Adam J. Kasper, as to the improvements in question." It would seem from this contention that the counsel for Kasper would urge in this court that Nicholas Streit was still a tenant from year to year at the time that he gave the chattel mortgage to Kasper, although in the lower court Kasper, from the beginning to the end of the case, by sworn pleadings and by evidence, asserted that the plaintiffs in error had abandoned the premises at a time prior to the making of the chattel mortgage. Assuming that Nicholas Streit, after the expiration of the period fixed by the written leases from Cooke to himself, was a tenant from year to year, nevertheless, when he abandoned the premises, he surrendered his tenancy. The abandonment of premises by a tenant is a restoration of the occupancy by the landlord. It is not necessary to cite authorities in support of this well known principle of law. As Nicholas Streit abandoned the premises before he gave the chattel mortgage to Kasper, he was not a tenant from year to year at the time of the giving of the mortgage. We do not wish to be understood as conceding the contention of counsel that if Nicholas Streit made a sale of the improvements to Kasper while he (Nicholas Streit) was holding over from year to year, that Kasper would have the right to the possession of the improvements after Nicholas Streit had abandoned the premises and the improvements.

The decree of the Circuit Court of Cook County will be reversed and the cause remanded, with directions to the chancellor to enter a decree giving the whole fund in question, in the possession of the County Treasurer, to Catherine S. Fay and the Cooke heirs.

REVERSED AND REMANDED WITH DIRECTIONS.

arch Term, 1913, No.
105 - 19101

THE CITY OF CHICAGO,
Defendant in Error,

vs.

VICTOR JACOBS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

186 I.A. 120

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error Jacobs was charged in a complaint filed in the Municipal Court with disorderly conduct in violation of sec. 2012 of the Municipal Code of Chicago. He waived a trial by juzy, was tried by the Court, found guilty and a fine of $200 assessed against him.

The contentions that the judgment should be reversed because no plea of not guilty was entered, because no venue was proven and because the trial Judge was prejudiced or made improper remarks, are all without merit.

The testimony on the part of the plaintiff tended to show that the defendant was guilty of disorderly conduct. It was met by the denial by the defendant of the acts and conduct testified to by the witnesses for the plaintiff and by the testimony of two witnesses that defendant's reputation for morality was good. We cannot, on the evidence in the record, say that the finding of the Court was against the evidence, and the judgment is affirmed.

AFFIRMED.

rch Term, 1913, No.
155 - 19154

ANNA FARRELL,
Defendant in Error,

vs.

WILLIAM J. FARRELL, MRS. MARY FARRELL, MISS MARY FARRELL and ANNIE GALLAGHER,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

186 I.A. 121

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

While in view of the conclusion reached by us, the conflicting statements in the transcript of the record in this case may be disregarded, we think it proper to call attention to such statements, to the end that greater care may be observed by the Clerk of the Municipal Court in keeping the records of that Court and in making transcripts of such records to be filed in this Court.

The transcript states that "On the 2nd day of November, A. D. 1912, a certain affidavit for replevin was filed in the office of the Clerk of said Municipal Court in words and figures following, to-wit". Then follows an affidavit purporting to have been sworn to November 1s, 1912, before Leonard Reid, one of plaintiff's attorneys. The transcript then states that "On the 8th day of November, 1912, a certain replevin writ was issued out of the office of the Clerk of said Court". Then follows a replevin writ dated the 2nd day of November, 1912, on which a return of the bailiff is endorsed, stating that the writ was received November 2, read to one of the defendants November 4 and returned November 8, 1912.

Defendant in error Anna Farrell brought replevin in the Municipal Court November 2, 1912, against the plaintiffs in error to recover possession of certain furniture. The bailiff was unable to obtain possession of the goods. November 9 the defendants entered their appearance and the Court gave leave to plaintiff to file a statement of claim in trover. No such statement was filed, but the parties treated the action as one of trover. The jury found defendants guilty, assessed the plaintiff's damages at $350, the Court entered judgment on the verdict, which the defendants, as plaintiffs in error here, seek to reverse. William J. and Mrs. Mary Farrell are husband and wife. Miss Mary Farrell and Annie Gallagher are their daughters. Anna Farrell, the plaintiff, married William Farrell, a son of William J. and Mary Farrell in 1903, and lived with him until 1908, when they separated. The evidence tends to show that some one took from the flat where William and Mary Farrell had lived up to the time they separated all the property except the furniture and his clothing; that William Farrell hired an expressman to move the furniture to his father's house and that Mary Farrell was with him when the furniture was moved.

We shall consider only the question whether the evidence shows any right of recovery in plaintiff against the defendant Annie Gallagher, and shall not express an opinion as to any of the other questions in the case. Annie Gallagher, as has been said, was the daughter of William J. Farrell. She was married August 20, 1911, and September 4 went to Detroit to live. She returned to Chicago August, 1912, and remained at her father's house until November, when she moved into a flat. While so at her father's house plaintiff made a written demand on her and the other plaintiffs in error for the furniture in question. There is in the record no evidence tending

to show that Mrs. Gallagher had possession of any of the furniture in question at the time the demand was made or at any other time, nor that she was then or at any other time claimed to be entitled to the possession of, or to have any right in or to, such property. The demand on her and her failure to deliver the possession of the property were not evidence from which the jury might properly find her guilty of a conversion of the property. The judgment is clearly erroneous as to her and under the rule that a judgment erroneous as to one defendant must be reversed as to all, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

March Term, 1913, No.
177 - 19180

FIFTH AVENUE LIBRARY SOCIETY, a corporation, Defendant in Error, vs. DR. J. A. CAVANAUGH, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

186 I.A. 123

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment recovered by the plaintiff for the amount due on a written contract for the purchase of books.

The objection that the plaintiff could not maintain the action because the demand had been assigned to a third party is without merit. At common law such an action must be brought by a party to the contract. Under the Codes of some of the States the action must be brought by the person interested. In this State , when the demand arising under such a contract is assigned, the action may be maintained either by the original party or by the assignee.

The objection urged to an answer to one of the interrogatories given in a deposition might have been obviated by issuing a new commission and re-examining the witnesses. Such an objection must be made by motion to suppress before the trial and it is too late to object to the testimony at the trial.

Whether the books delivered to defendant corresponded with the sample shown him was a question of fact on which, on the evidence in this record, the finding of the Court is conclusive.

The judgment is affirmed.

AFFIRMED.

March Term, 1913, No.
320 - 19353

In the matter of the Petition of GEORGE CHECKESFIELD, On appeal of GEORGE CHECKESFIELD, Appellant,

vs.

ETHEL McKERNAN, Appellee.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

186 I.A. 137

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In case for malicious prosecution appellee Ethel McKernan recovered a judgment for $1800 against appellant Checkesfield. On a ca. sa. issued on this judgment Checkesfield was arrested and thereupon filed his petition in the County Court to be released from such imprisonment. The Court denied his petition, remanded him to the custody of the Sheriff and he appealed.

Malice is of the gist of the action for malicious prosecution and the County Court therefore properly denied the prayer of the petition, and the order appealed from is affirmed.

AFFIRMED.

March Term, 1918, No.

339 - 19553

MICHAEL BITTINS,
Appellee,

vs.

CALUMET & SOUTH CHICAGO RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

186 I.A. 138

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant street railway company from a judgment recovered by plaintiff Bittins for damages alleged to have been sustained by him through the negligence of the defendant.

An electric street car operated by defendant ran south in Commercial avenue to 92nd street and turned east in that street. That the car stopped with the front end north of the north cross walk in 92nd street is not disputed. In three counts of the declaration plaintiff averred that intending to become a passenger he, while the car was standing still, stepped on the platform and attempted to get on the car, and that the defendant negligently started the car and thereby he was thrown from the car and injured. The third count alleged that while the car was moving very slowly plaintiff attempted to get on the car, but the defendant negligently, etc., caused the speed of the car to be suddenly increased and thereby he was thrown from the car and injured.

There is in the record no evidence tending to prove the allegations of the third count. The only evidence in the record tending to prove that the car was standing

still when plaintiff attempted to get onto it, and that while he was doing so the car was started forward, is the testimony of the plaintiff, which is conflicting and unsatisfactory. He first testified that the car was standing still when he attempted to board it, and then testified that he attempted to get on the rear end of the car and that when he did so the rear end of the car had reached the corner of 92nd street. On cross-examination he testified in substance that before he attempted to board the car it had started forward and gone from 40 to 50 feet; that the front end of the car was then "half over the street". Opposed to plaintiff's testimony was the testimony of the conductor, who was on the rear platform, of Kuetzer, who was also on the rear platform, of Kasper, a newsboy, who was on the car and getting ready to get off, of Hogan, who was on the rear platform when the car reached 92nd street and there left it, of Warden, who was on the sidewalk and saw the plaintiff attempt to board the car, all of whom stated that plaintiff attempted to board the car while it was in motion, going around the curve.

We think that the only conclusion that can properly be drawn from the evidence is that the car was not standing still when plaintiff attempted to board it, but was then in motion. It follows from what has been said that in our opinion the evidence fails to show that the defendant was guilty of any negligence in the operation of the car, and the judgment will therefore be reversed.

REVERSED.

339 - 19353 FINDING OF FACT..

The Court in this case finds as a fact that the evidence fails to show that the defendant was guilty of the negligence alleged in any count of the declaration.

March Term, 1913, No.
12[illegible] - 18752

JOHN G. HALE, Plaintiff in Error, vs. EDWARD A. FERGUSON, UNION CENTRAL LIFE INSURANCE CO. and CHARLES W. SAMPSON, Defendants in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

186 I.A. 156

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error in this case, John G. Hale, was sued in 1906 before a Justice of the Peace in Cook County by Edward A. Ferguson, one of the defendants in error herein, on a promissory note given by him to said Ferguson in 1904 for $215.55. Judgment having been given against him for $200 by the Justice he appealed to the Circuit Court of Cook County, where a judgment for the same amount was entered against him on a trial de novo, the jury being instructed by the Court to find a verdict for that amount. From this judgment of the Circuit Court Hale appealed to this Court. This appeal was decided by the Branch Appellate Court on June 30, 1908. The judgment was affirmed. After alluding to certain evidence offered by the appellant below, the exclusion of which he argued was error because it was "admissible to show fraudulent representations in securing the execution of a note or to show a partial failure of consideration even to the extent of varying the terms of the instrument", the opinion of the Court said: "However this may be, there is no evidence tending to show that the execution of the note was secured by fraud", and farther on - "We find no evidence tending to show any failure of consideration nor any legal defense to the note sued upon."

We have recited this because in the present appeal

the appellant Hale takes the ground that all that the Court decided was that the evidence excluded was not competent in law but might be in equity, and that in the absence of the evidence in the law suit, the judgment in that suit was correct. But the context makes it apparent to us that the "evidence" alluded to by the Court which did not tend to show fraud or want of consideration, was the evidence offered, heard and then stricken out, and that the decision of the Branch Appellate Court was in effect that no defense existed at law or equity to the note, even admitting all the defendant asserted in his excluded evidence.

After this affirmance, Ferguson, failing to obtain satisfaction of his judgment, brought suit against the surety on the appeal bond (one Lelia H. Hale) in the Municipal Court of Chicago and obtained a judgment against her for $244.45 and costs. From this judgment an appeal was taken to this Court, which affirmed the judgment June 19, 1911.

Meanwhile on March 28, 1908, John G. Hale had brought a bill in equity in the Superior Court to enjoin Ferguson from proceeding to collect the judgment against him, which, after the affirmance of the judgment against Lelia H. Hale, he amended to include a prayer for an injunction against the enforcement of that judgment also. This amended bill was demurred to by Ferguson, the demurrer setting up that the face of the bill showed that the matter was res adjudicata and that there had been laches in prosecuting it. The demurrer was sustained and the bill dismissed July 8, 1912. July 13, 1912, the complainant moved to vacate the order of dismissal and to make Lelia H. Hale a party complainant. This motion being denied, Lelia H. Hale on July 20, 1912, joined complainant in another motion to the same effect and this motion was also denied. Thereupon John G. Hale sued out this writ of

error.

We see no error in the action of the Superior Court. The matter set up in the bill would have been available, if it had been available at all, in law as well as in equity. It had been decided not to be, and the matter was res adjudicata in the Superior Court and this Court.

The decree of the Superior Court is affirmed.

AFFIRMED.

rch Term, 1913, No.
60 - 19046

ARTHUR T. VREELAND, Plaintiff in Error, vs. WARREN VREELAND, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

186 I.A. 183

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This writ of error to the Municipal Court of Chicago brings before us that which in its practice is equivalent to the sustaining of a demurrer to a plaintiff's declaration and giving judgment for the defendant on the plaintiff's standing by said declaration.

The plaintiff in error here was plaintiff below and filed a "Statement of Claim", which the Court ruled was insufficient to sustain an action.

The plaintiff declined to take advantage of leave to file an amended or more specific statement of claim which was given him, and elected "to stand by his original statement of claim". Thereupon the Court entered a judgment of nil capiat and for costs against him and he sued out this writ of error.

The question therefore is whether the "statement of claim" in question did state a cause of action. The statement proper is:

"Plaintiff's claim is upon the contract hereto attached for money had and received by defendant, to-wit, $1000, received by defendant as one of the heirs of John J. Vreeland, deceased, by virtue of a settlement of the suit to contest John J. Vreeland's will; said sum is one-sixth of the amount received by defendant."

Of course the determination of the question whether the statement sets up a cause of action depends therefore on the contents of the instrument attached. That instrument recites itself to be an agreement between the plaintiff, Arthur T. Vreeland, of the one part, and five other persons, parties of the second part. It is signed and sealed by all.

Arthur T. Vreeland is described as the only heir at law and next of kin of Laura M. Vreeland, whom another clause shows to be living. As, according to the old legal maxim "Nemo est haeres viventis", Laura M. Vreeland had no heirs, this was a misdescription, but the meaning is plain enough. He was either "heir apparent" or "presumptive" and next of kin. The other five parties are described as the heirs at law of John J. Vreeland, deceased. The instrument proceeds:

"WHEREAS, each of the parties hereto is desirous of giving the other an equal interest and property which may come to them from the respective estates of the said John J. Vreeland and Laura M. Vreeland (upon her death) as heirs or beneficiaries under any last will and testament; and

WHEREAS, the parties hereto are desirous of joining together in the contest of the alleged will of the said John J. Vreeland and Laura M. Vreeland (upon her death) as heirs or beneficiaries under any last will and testament; and

NOW THEREFORE, it is hereby agreed by and between the respective parties hereto, for and in consideration of the above mentioned premises and of the sum of one dollar each to the other paid, that the party of the first part shall have an equal interest with each of the several respective parties of the second part in the estate of the said John J. Vreeland, deceased, the same as he would have did he bear the same relationship to the said deceased as the parties of the second part; and that each of the respective parties of the second part shall have an equal interest with the party of the first part in the estate of Laura M. Vreeland upon her death the same as they or either of them would have upon her death did they bear the same relationship to her as does the party of the first part.

And it is further agreed by and between the parties hereto that in the event of the death of the said Laura M. Vreeland, testate, making the party of the first part a beneficiary under her will to all or any part of her estate, then the parties of the second part shall each be entitled to one-sixth of the property or estate so bequeathed to the said party of the first part.

And it is further agreed by and between the parties hereto that no assignment or other disposition shall be made by any or either of the parties hereto of their respective right, interest or claim in and to the said respective estates in which they have or may have an interest as heirs at law or beneficiary under any last will and testament.

IN WITNESS WHEREOF, the parties hereto have placed their hands and seals this 25th day of April, A. D. 1910."

The argument of the defendant in error upon which he principally relies, is that as evidently Arthur J. Vreeland had no right or power to agree for Laura A. Vreeland that the other parties to the memorandum should have any part of her estate, and as he had at the time no right or claim to it whatever, inchoate or otherwise, he could and did assign nothing nor even promise anything of value to those parties by his signed and sealed agreement. From this it follows, it is argued, that there being no consideration for the agreement of the other five parties (including the defendant herein) that he (Arthur J. Vreeland) should "have an equal interest with each of the said several respective parties of the second part in the estate of the said John J. Vreeland, deceased, the same as he would have did he bear the same relationship to the said deceased as the parties of the second part", it is ineffective and invalid. But this is hardly sound. The instrument is a sealed one, and it is at least very doubtful whether the want of mutuality or of consideration given by the plaintiff is either pleadable or provable against this action on it. The suit is at law and under the pleadings provided for actions in the Municipal Court, the action may be considered to correspond with covenant.

But however this may be, we do not think the Court erred in practically sustaining a demurrer to the "statement of claim" by striking it from the files and requiring the plaintiff "to file a more specific statement of claim within five days from date." If it was not in error in that action it follows, of

course, that it was not in error in rendering judgment for the defendant when the plaintiff failed to comply with the order.

The "statement of claim" did not state a cause of action in any view.

The agreement or covenant was, as above stated, that Arthur V. Vreeland should have an equal interest with each of the other five signers of the memorandum in the estate of John J. Vreeland.

The "claim" is stated to be "for money had and received by defendant as one of the heirs of John J. Vreeland by virtue of a settlement of the suit to contest John J. Vreeland's will." Received from whom and from what? And why? And when? Was the $1000, which "is one-sixth of the amount received by defendant", a part of the estate of John J. Vreeland? The covenant and the claim do not articulate, and without some intervening connection, the statement is altogether too vague to show a valid claim. If plaintiff wished to make it more definite and precise, he was given an opportunity but failed to avail himself of it.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

March Term, 1913, A.D.

102 - 19098

CHICAGO IRON AND METAL COMPANY, a corporation, Plaintiff in Error, vs. JACOB BERKSON and MYER BERKSON, trading as Berkson Bros., Defendants in Error.	Error to Municipal Court of Chicago.

186 I.A. 194

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit in replevin, in which the jury found that plaintiff was not entitled to the possession of the property taken.

Both parties were dealers in scrap iron, and the controversy arose out of negotiations concerning a sale of scrap iron by the defendant to the plaintiff. It is not in dispute that the parties agreed upon a price per ton on a quantity of iron in defendants' yard, the quantity to be determined as weighed in the yard upon delivery. Plaintiff paid $500 in cash and proceeded to remove the iron, and had taken out a quantity which, at the agreed price, amounted to nearly $500 worth, when the defendants refused to allow plaintiff to remove any more iron, whereupon this suit was brought.

Plaintiff claims that the sale was a completed transaction, and hence it was entitled to the possession of the iron. On the other hand defendants claim that it was a "spot cash" sale, no goods to be removed until paid for. After giving consideration to the conflicting testimony of the parties, we see no reason to disagree with the conclusion of the jury that the plaintiff failed to establish its claim as to the character of the sale, and that the greater weight of the evidence rather inclines toward the claim of the defendants.

It further appears that when plaintiff had taken away about $500 worth of iron, for which it had previously paid, defendants requested plaintiff to pay more money before any more iron should be removed, and that plaintiff promised to do so, but that plaintiff failed to keep its promise; that defendants repeatedly told plaintiff that it must pay before more iron could be taken out, but that plaintiff failed to make any further payment, and thereupon defendants refused to allow plaintiff's employes to remove any more of the scrap iron.

Under the contract of sale as established by the evidence, plaintiff was not entitled to the possession of the iron until it had paid for the same, and hence the verdict of the jury was correct and the judgment proper. The fact that plaintiff had not taken quite all of the iron for which it had paid did not entitle it to the possession of all the iron remaining in the yard, and we find no demand made for the delivery of any iron for which plaintiff had paid, not yet delivered.

Other points are discussed by both parties which do not modify this conclusion and do not call for comment.

The judgment is affirmed.

AFFIRMED.

March Term, 1915, No.

200 - 19205

FRANK A. KRAGA, Defendant in Error, vs. MATT W. ROBBINS, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

186 I.A. 198

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit for commissions said to be earned by plaintiff in securing a purchaser of defendant's property. Upon trial the jury returned a verdict for the plaintiff.

Plaintiff testified that in February, 1911, he was authorized by the defendant, through her son and agent, to secure a purchaser for her property in West Madison street for $14,000. He immediately began to work, and in May or June of that year interested Alex and Samuel Eisenstein, who made an offer of $14,000. This offer was communicated to the defendant and was declined, and plaintiff was told by defendant's agent that the price of the property had gone up. Plaintiff then secured offers from the same parties of $14,500, $15,000 and $15,400, but all of said offers were refused, and finally plaintiff was told by the defendant that the property was not for sale. This was in September. Subsequently the defendant and Alex Eisnstein continued their negotiations and the property was sold to Eisenstein in the following month, October, for $16,000.

It is claimed by the defendant that plaintiff's testimony was weakened by cross-examination and that he was contradicted in many respects by other witnesses.

It was peculiarly for the jury to determine the facts, and we see no reason for concluding that the verdict favorable to plaintiff's side of the case is manifestly against

the greater weight of the evidence. We do not agree with the contention that in every case the testimony of two or more witnesses must necessarily have greater weight than the testimony of a single opposing witness.

The facts in this case are like those in Hafner v. Herron, 165 Ill. 234, where the court said: "It is sufficient if the sale is effected through the efforts of the broker, or through information derived through him. * * * It is also true, that, where the seller consummates a sale of property upon different terms than those proposed to his agent the latter will not be thereby deprived of his right to commissions." To the same effect are the decisions in Rigdon v. Moore, 226 Ill. 382; Wilson v. Mason, 158 Ill. 304; Henry v. Stewart, 185 Ill. 448, and Wright v. McClintock, 136 Ill. App. 438.

Complaint is made of rulings of the court on evidence, and also of the conduct of plaintiff's attorney upon the trial. After giving consideration to these points we are of the opinion that there was no error in these respects sufficiently important to require a reversal.

The judgment is affirmed.

AFFIRMED.

March Term, 1913, No.
279 - 19285

W. L. ELDER, Appellee, vs. THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

186 I.A. 199

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment obtained by plaintiff for $465 for damages to an automobile owned by him and struck by an engine belonging to the defendant. Plaintiff has filed no brief in this court.

The accident occurred the latter part of October, 1911, about 7:20 P. M., at the Elizabeth street crossing of the track of the defendant. At this point there is a single track running due east and west between 58th and 59th streets, while Elizabeth street runs north and south and crosses the railroad track at right angles. The track is above the grade of Elizabeth street and is reached by a slight incline. On the east side of Elizabeth street is a coal yard surrounded by a fence the south line of which is over 22 feet north of the north rail of the track, there being nothing between the fence and the railroad to obstruct the view eastward.

On the night in question Peter Ruhl and George Kessers, after having driven Mr. Elder, the plaintiff and owner of the machine, to his residence on West 55th street, proceeded west on 55th to Elizabeth and turned south on Elizabeth. As they approached the railroad track an engine with one or two cars was going west over Elizabeth street.

Kuhl, who was driving, stopped the automobile at the foot of the slight incline running from the grade of Elizabeth street to the track, which was about 10 or 14 feet north of the north rail. He waited until the engine and cars had proceeded westward about 50 feet. During all this time the engine of the automobile was running. After the engine and cars had passed Elizabeth street Kuhl started his machine up the incline; he looked neither to the east nor to the west, but straight ahead. He reached a point within two feet of the north railroad track when, looking east, he discovered an engine, with the headlight lighted and bell ringing, 150 feet east of Elizabeth street and coming toward the crossing at the rate of 10 miles an hour. As Kuhl testified, he gave the engine of his automobile more gas, which caused it to choke and stop on the track. An effort was then made by both men to push the automobile off the track, and they succeeded in moving it south over the track except the rear wheels. Kuhl then ran east on the south side of the track for a distance of 30 feet, calling for the engineer to stop. The locomotive did not stop but hit the automobile. All this time the bell on the locomotive was ringing and the headlight lighted, and the fireman and engineer testified that they could see from 20 to 25 feet ahead of the engine, the engineer testifying that the first he saw of the automobile was when the locomotive was on the east crossing of Elizabeth street; that he was then running about eight miles an hour, and that it was only a second after he saw the automobile until it was struck; that as soon as he saw it he set the air in emergency and reversed the engine, but the rail was damp and slippery and the engine slid on the rails about 40 to 60 feet west of Elizabeth street; that when he first set the brakes he

was about 10 or 15 feet from the automobile. There were no lights on the automobile and no signals or warning given him by anyone that the automobile was on the track.

The fireman testified that he did not see the automobile or any person until after the engineer told him of the occurrence.

We are of the opinion that this accident was caused by the failure of the men in charge of the automobile to exercise ordinary care. There was nothing to prevent them from seeing the approaching locomotive with its headlight burning if they had looked. Neither was there anything to prevent them from hearing the ringing of the bell on the approaching locomotive. The testimony shows that it was a very dark night, and we cannot conceive of anyone in the exercise of ordinary care driving an automobile on a dark night upon a railroad track, where it is known that trains are frequently passing, without the slightest concern with reference to whether or not a train was approaching. Such conduct has been held to be contributory negligence barring a recovery in so many cases that further discussion is unnecessary. Among such cases are: Lovenguth v. City of Bloomington, 71 Ill. 238; Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658; Beidler v. Branshaw, 200 Ill. 425; Wilson v. Illinois Central R. R. Co., 210 Ill. 603; Howes v. Chicago & E. I. R. R. Co., 217 Ill. 500; Chicago & Alton R. R. Co. v. Williams, 87 Ill. App. 511; Cleveland, C., C. & St. L. Ry. Co. v. Sparks, 122 Ill. App. 400; Chicago, B. & Q. R. R. Co. v. Sack, 136 Ill. App. 425; New York C. & H. R. R. Co. v. Haidment, 168 Fed. 21.

Finding, as we do, that plaintiff, through his agents in control of the machine, was guilty of negligence which contributed to the accident in question, the judgment is reversed without remanding the cause. REVERSED.

279 - 19285

FINDING OF FACT.

The court finds that the plaintiff, W. L. Elder, was guilty of contributory negligence which caused the accident upon which this suit is based, as charged in the statement of claim herein.

March Term, 1913

307 - 19315

In re Estate of CATHERINE WELCH, deceased. On the appeal of JOHN H. O'BRIEN, Appellant, vs. MARGARET WELCH, Appellee.	)	Appeal from Circuit Court, Cook County.

186 I.A. 200

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In a proceeding under section 81 of the statute on Administration of Estates, the appellant, John H. O'Brien, upon citation appeared in the Probate Court, and after hearing the evidence the court found that he had in his possession $985.10, the property of the estate of Catherine Welch, deceased, and entered an order directing that the same be paid to the administratrix. From this order appellant appealed to the Circuit Court, and he there appeared and defended, and after testimony had been heard the Circuit Court ordered him to pay this money to the administratrix; and from this order he has appealed to this court.

Appellant's objection to the sufficiency of the affidavit filed by the administratrix in pursuance of section 81, supra, is answered by the decision in Wade v. Pritchard, 69 Ill. 279, that where the party appears and goes to trial he waives any objection to the sufficiency of the affidavit.

As to the point that all parties shown to be interested in the property or controversy should be brought before the court, it is only necessary to examine section 81, supra, to ascertain that it is not necessary to make the beneficiaries of an estate parties to such proceeding; they are in fact already parties to any proceeding in the course of administration of an estate.

In re Estate of CATHERINE WELCH, deceased.	
On the appeal of JOHN H. O'BRIEN, Appellant,	Appeal from Circuit Court, Cook County.
vs.	
MARGARET WELCH, Appellee.	

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In a proceeding under section 81 of the statute on Administration of Estates, the appellant, John H. O'Brien, upon citation appeared in the Probate Court, and after hearing the evidence the court found that he had in his possession $888.10, the property of the estate of Catherine Welch, deceased, and entered an order directing that the same be paid to the administratrix. From this order appellant appealed to the Circuit Court, and he there appeared and defended, and after testimony had been heard the Circuit Court ordered him to pay this money to the administratrix; and from this order he has appealed to this court.

Appellant's objection to the sufficiency of the affidavit filed by the administratrix in pursuance of section 81, supra, is answered by the decision in Wade v. Pritchard, 88 Ill. 272, that where the party appears and goes to trial he waives any objection to the sufficiency of the affidavit.

As to the point that all parties shown to be interested in the property on controversy should be brought before the court, it is only necessary to examine section 81, supra, to ascertain that it is not necessary to make the beneficiaries of an estate parties to such proceeding; they are in fact already parties to any proceeding in the course of administration of an estate.

The real controversy concerns the claim of appellant that this property was given to appellant by Catherine Welch to be held by him in trust for the benefit of certain persons. The elements necessary to constitute a gift inter vivos are stated thus in Telford v. Patton, 144 Ill. 611 (620):

> "It is essential to a donation inter vivos, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, that there be 'such a change of possession as to put it out of the power of the giver to repossess himself of the thing given.' (1 Parsons on Cont., marg. page 234.)"

To the same effect are Selleck v. Selleck, 107 Ill. 389; Shafer v. Manning, 132 Ill. App. 570, and Divine v. Stepanek, 176 Ill. App. 61.

In the case before us the evidence fails to establish a gift inter vivos in trust. Appellant was Mrs. Welch's agent with reference to the sale of certain real estate, and collected the money therefrom which he retained, of which the fund in question is a part. He testified that he held this money subject to Mrs. Welch's orders, and he explicitly says that if at any time during her lifetime she had asked for it he would have turned it over to her. We are of the opinion that the entire testimony shows that Mrs. Welch and the others who knew of the matter considered the money to be hers, to be spent or disposed of in whatever manner she saw fit during her lifetime, without any intention of parting with its control.

The judgment of the Circuit Court was right and is affirmed.

AFFIRMED.

The real controversy concerns the claim of appellant that this property was given to appellant by Catherine Welch to be held by him in trust for the benefit of certain persons. The elements necessary to constitute a gift inter vivos are stated thus in Telford v. Patton, 144 III. 671 (680):

> "It is essential to a donation inter vivos, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, that there be 'such a change of possession as to put it out of the power of the giver to repossess himself of the thing given.' (1 Par-sons on Cont., marg. page 734.)"

To the same effect are Sellock v. Sellock, 107 III. 655; Shafer v. Manning, 132 III. App. 570, and Divine v. Stephenek, 176 III. App. 61.

In the case before us the evidence fails to establish a gift inter vivos in trust. Appellant was Mrs. Welch's agent with reference to the sale of certain real estate, and collected the money therefrom which he retained, of which the fund in ques-tion is a part. He testified that he held this money subject to Mrs. Welch's orders, and he explicitly says that if at any time during her lifetime she had asked for it he would have turned it over to her. We are of the opinion that the entire testimony shows that Mrs. Welch and the others who knew of the matter con-sidered the money to be hers, to be spent or disposed of in what-ever manner she saw fit during her lifetime, without any intention of parting with its control.

The judgment of the Circuit Court was right and is affirmed.

AFFIRMED.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and twelve, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. HENRY B. WILLIS, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the ~~12~~th day of ~~March~~ Nov, A. D. 1913, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5836

The People of the State of Illinois.

Defendant in Error.

vs Error to McHenry.

Romo Frioni, Plaintiff in error.

186 I.A. 215

Dibell, J.

Romo Frioni and three others were indicted in the circuit court of McHenry County. All the counts of the indictment were quashed except the fifth, sixth and tenth. The fifth count charged that the defendants, in said county fraudulently conspired with each other, with the fraudulent and malicious intent feloniously to obtain by false pretenses the moneys of the Citizens State Bank of Crystal Lake, an Illinois corporation, and to cheat and defraud said bank of the same. The sixth count was substantially the same. The tenth count charged that said defendants, in said county, fraudulently intending to get into their possession a large sum of money, of the value of, to-wit $800, a more particular dexcription of which was to the grand jurors unknown, of the moneys of the Citizen's State Bank of Crystal Lake, an Illinois ~~xxxxxxxxxx~~ banking corporation, by false and fraudulent means, did fraudulently and feloniously conspire together with each other and with other persons whose names were unknown, to obtain by false pretenses said sum of money of the moneys o the Citizen's State Bank of Crystal Lake, with the intent to cheat and defraud said bank. Frioni pleaded not guilty, and was tried alone, and was convicted and sentenced to imprisonment in the penitentiary, and to pay a fine He sued out this writ of error to reverse the judgment.

So far as appears from the record before us, it is doubtful if there is even a preponderance of evidence that

Dec. Ts. 1894

The People of the State of Illinois,

Defendant in Error,

vs

Error to McHenry.

Homo Triton, Plaintiff in error.

186 I.A. 215

Ebell, J.

Homo Triton and three others were indicted in the circuit court of McHenry County, all the members of the indictment were quashed except the fifth, sixth and tenth. The fifth count charged that the defendants, in said county fraudulently conspired with each other, with the fraudulent and malicious intent feloniously to obtain by false pretenses the moneys of the Citizens State Bank of Crystal Lake, an Illinois corporation, and to cheat and defraud said bank of the same. The sixth count was substantially the same. The tenth count charged that said defendants, in said county, fraudulently intending to get into their possession a large sum of money, of the value of, to-wit $500, a more particular description of which was to the grand jurors unknown, of the moneys of the Citizens State Bank of Crystal Lake, an Illinois ~~xxxxxxxxxxx~~ banking corporation, by false and fraudulent means, did fraudulently and feloniously conspire together with each other and with other persons those names were unknown, to obtain by false pretenses said sum of money of the moneys of the Citizen's State Bank of Crystal Lake, with the intent to cheat and defraud said bank. Triton pleaded not guilty, and was tried alone, and was convicted and sentenced to imprisonment in the penitentiary, and to pay a fine. He tried out this writ of error to reverse the judgment.

So far as appears from the record before us, it is insisted it does is even a preponderance of evidence that

the defendant is guilty. True, the jurors had an opportunity which we have not, of seeing the witnesses. But to sustain a conviction upon this evidence, it is material that the record should show that the jury were properly instructed. The fifth instruction given at the request of the people, in telling the jury what was sufficient to sustain a charge of conspiracy, entirely omitted the element of false pretenses. The conspiracy must have been to obtain by false pretenses, in order to meet the charge in the three counts above stated. The eight instruction given at the request of the people, after stating the rule of law that the defendant is presumed to be innocent until a verdict is reached finding him guilty, further said: "This rule of law is not meant to prevent you from being convinced of the guilt of the defendant at any time during the trial when the evidence, if any, is sufficient to so convince you of his guilt, and if you are convinced by the evidence at any time during the trial of the guilt of the defendant in manner and form as charged in the indictment, beyond a reasonable doubt, and there is no other subsequent evidence which raises in your mind a reasonable doubt of the guilt of the defendant, and you remain so convinced until all of the evidence is in, then you should find the defendant guilty." The effect of this instruction would naturally be to give the jury to understand that they could arrive at a conclusion of the defendant's guilt before the hearing of the evidence was completed, and after being convinced of his guilt, they had a right to remain so convinced, unless other subsequent evidence raised in their minds a reasonable doubt of his guilt, whereas the true question to be determined by the jury is whether, after all the evidence and arguments and instructions have been heard, they have a reasonable doubt of his guilt. It

the defendant is guilty. Thus, the jurors had an opportunity which we have not, of seeing the witnesses. But to sustain a conviction upon this evidence, it is material that the record should show that the jury were properly instructed. The fifth instruction given at the request of the people, in telling the jury what was sufficient to sustain a charge of conspiracy, entirely omitted the element of false pretenses. The conspiracy must have been to obtain by false pretenses, in order to meet the charge in the three counts above stated. The eight instruction given at the request of the people, after stating the rule of law that the defendant is presumed to be innocent until a verdict is reached finding him guilty, further said: "This rule of law is not meant to prevent you from being convinced of the guilt of the defendant at any time during the trial when the evidence, if any, is sufficient to so convince you of his guilt, and if you are convinced by the evidence at any time during the trial of the guilt of the defendant in manner and form as charged in the indictment, beyond a reasonable doubt, and there is no other subsequent evidence which raises in your mind a reasonable doubt of the guilt of the defendant, and you remain so convinced until all of the evidence is in, then you should find the defendant guilty." The effect of this instruction would naturally be to give the jury to understand that they could arrive at a conclusion of the defendant's guilt before the hearing of the evidence was completed and after being convinced of his guilt, they had a right to remain so convinced, unless after subsequent evidence raised in their minds a reasonable doubt of his guilt. Where the question to be determined by the jury is simply, after all the evidence and argument, if the instructions have been issued, they have a reasonable doubt of his guilt. It

gives the jury to understand that if they are still convinced of his guilt when all the evidence is in, that conclusion is to remain regardless of the arguments of counsel and the instructions of the court. It tells the jury that they should findthe defendant guilty if they are convinced of his guilt at the close of the evidence, whereas the presumption of innocence is to remain with the jury until, after they have heard the evidence and the arguments of counsel and the instructions of the court, they retire to their jury room and are there satisfied of his guilt beyond a reasonable doubt. The tenth instruction directs a verdict of guilty, and contains no reference to the evidence, and does not require the jury to find his guilt from the evidence. The eleventh instruction applies to the defendant only the proposition that they may take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses. There were other witnesses who were contradicted and that proposition should have been made to apply to all of the witnesses, and not to the defendant alone. The thirteenth instruction given for the people, relating to the subject of reasonable doubt, was a stock instruction, often approved, except that there was inserted therein the following: "To acquit under the influence of doubts unreasonably created from whatever cause is a vittual violation of the juror's oath, and an offense of great magnitude against the interests of society." We regard this as an effort to frighten or drive the jury to a conviction , and we think the language unauthorised. In all these respects we regard the instructions as erroneous and injurious to the defendant.

For the errors indicated, the judgment is reversed and the cause remanded.

[illegible] to understand that if they are still convinced of his guilt when all the evidence is in, that conclusion is [illegible] regardless of the arguments of counsel and the [illegible] of the court. It tells the jury that they [illegible] find the defendant guilty if they are convinced of his guilt at the close of the evidence. Unless the presumption of innocence is to remain with the jury until, after they have heard the evidence and the arguments of counsel and the instructions of the court, they retire to their jury room and are there satisfied of his guilt beyond a reasonable doubt. The trial instruction thereby violates the guilty, and contains no reference to the evidence, and does not require the jury to find his guilt from the evidence. The [illegible] instruction applies to the defendant only the presumption that they may take into consideration the fact, if such is the fact, that he has been convicted by other witnesses. There were other witnesses who were convicted. [illegible] proposition should have been made to apply to all the witnesses, and not to the defendants alone. The challenged instruction given for the people, relating to the guilt or innocence, beyond doubt, was a stock instruction, often condemned, [illegible] that there was inserted therein the following: "To convict under the influence of duress unreasonably created [illegible] whatever cause is a virtual violation of his jurors' oath, [illegible] an offense of such magnitude involve the interests of society." The reason this is an effort to frighten or coerce the jury to a conviction, and is held to be improper and [illegible]. In all cases requiring the reversal of a judgment [illegible] erroneous and injurious to the defendant.

For the errors indicated, the judgment is reversed and the cause remanded.

TATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate ourt, in and for said Second District of the State of Illinois, and keeper of the Records d Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the id Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirteen.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and twelve, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. HENRY B. WILLIS, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the ~~12th~~ 13 day of ~~March~~ May, A. D. 1913, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. 5856. & 5857

People for use etc. appellant.

vs Appeal from LaSalle.

John L. Witzeman, et al appellees. 186 I.A. 2

Per Curiam

The two cases above entitled were actions of debt on the official bonds of Witzeman as circuit clerk of LaSalle County covering two terms in said office. In each case all breaches assigned in the declaration were dismissed except the second breach, which related to naturalization fees. In each case the defendants demurred to the second breach, and the demurrer was sustained, and the plaintiff elected to abide by said demurrer and there was judgment rendered against plaintiff, from which plaintiff appealed.

Appeals in actions at law lie from final judgments only. To make these orders final, they should have adjudged "that the plaintiff take nothing by his suit, and that the defendants go hence without day" as held in Seghetti v Berry Coal Co. 169 Ill. App. 488; Ajax Rubber Co. v Gray, 179 Ill. App. 377, and People v Johnson, 179 Ill. App. 467; and in the cases there cited, and In Wenom v Fossick, 213 Ill. 70. For the reasons stated in those and other cases, these cases are still pending in the court below, and we have no jurisdiction to decide the merits of the controversy. It would be idle for us to ignore this defect, and decide the merits; for, if we should affirm the action of the trial court and an appeal should be prosecuted to the Supreme Court, our judgment would be treated as void, as held in Chicago Portrait Co. v Chicago Crayon Co. 217 Ill. 200.

The appeals are therefore dismissed, with leave to each party to withdraw allpapers filed by it.

Appeals dismissed.

[illegible]. 5886. 2 SUSY

People for use etc. appellant.

vs Appeal from Lafolle.

[illegible] L. Wiseman, et al appellees.

[illegible] Curiam

The two cases above entitled were actions of debt on the official bonds of Wiseman as circuit clerk of Lafolle County covering two terms in said office. In each case all breaches assigned in the declaration were discharged except the second breach, which related to naturalization fees. In each case the defendants demurred to the second breach, and the demurrer was sustained, and the plaintiff elected to abide by his demurrer and then the judgment followed against plaintiff in each case which plaintiff assigns.

Appeals in actions at law lie from final judgments only. To make these orders final, they should have adjudged that the plaintiff take nothing by his suit, and that the defendants go "without day" as held in Illinois v Henry Coal Co. 1[illegible] Ill. App. 488; Alex Rubber Co. v Cary, 1[illegible] Ill. App. 1[illegible], and Johnson v Johnson, 1[illegible] Ill. App. 6[illegible]; but if the order [illegible] final, and Le Weese v Tuckey, 1[illegible] Ill. 3[illegible]. But the judgment entered in these and other cases, these points are quite immaterial, as the court below, when we have no jurisdiction to decide the merits of the controversy. It seems to be the duty of the defendant, and doubtless the [illegible]; yet, if it should claim the action of the trial court [illegible] proceeded to the merits [illegible] treated as void, as held in Chicago Northern Co. v Wilson Co. 1[illegible] Ill. App.

The suit is for [illegible], with leave to amend by withdrawing allegations filed by it.

TATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate ourt, in and for said Second District of the State of Illinois, and keeper of the Records nd Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the aid Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and thirteen.

_____

Clerk of the Appellate Court.

910

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and twelve, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. HENRY B. WILLIS, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

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186 I.A. 217

BE IT REMEMBERED, that afterwards, to-wit: on the ~~12~~th day of ~~March~~, A. D. 1913, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5887/

The People of the State of Illinois,
ex rel Charles Agnew, Pltf. in error.

vs Error to LaSalle.

Edward Graham, et al Defts in error.

186 I.A. 217

Per Curiam.

The People of the State of Illinois on the relation of Charles Agnew presented a petition to the court below for leave to file an information in the nature of a quo warranto against Edward Graham, F. E. Blakeslee and P. J. Gruise and were granted such leave and thereafter filed an information charging that said persons were unlawfully holding and executing the positions of mayor and aldermen of the city of Earlville, and the positions of president, secretary and member of the board of local improvements of the city of Earlville, and prayed that they be required to answer by what warrant they and each of them claimed to hold and execute said offices. Summons were served and the respondents filed a plea setting up their title to said offices. A general and special demurrer was interposed to said plea, and said demurrer was overruled, and the People elected to abide by such demurrer. The court entered a rule on the People to reply instanter; defaulted the people for want of a reply; found the respondents not guilty, and entered a judgment that the defendants recover from the people on the relation of Charles Agnew their costs, with execution therefor. From that order plaintiff prosecutes this appeal.

We are of the opinion that after the plaintiff elected to abide by its demurrer, thus submitting the case upon a question of law only, the court should not have ruled plaintiff to reply and should not have defaulted plaintiff and should not have entered a finding, and that these matters appearing

Sup. Ct. 6007\

The People of the St te of Illinois,

ex rel Charles Agnew, Plff. in error,

vs Error to LaSalle.

Edward Graham, et al Defts in error.

Mr Justice.

The People of the State of Illinois on the relation of Charles Agnew presented a petition to the court below for leave to file an information in the nature of a quo warranto against Edward Graham, F. E. Blakeslee and P. J. Willis and were granted such leave and thereafter filed an information charging that said persons were unlawfully holding and exercising the positions of mayor and alderman of the city of Earlville, and the positions of president, secretary and member of the board of local improvements of the city of Earlville, and praying that they be required to answer by what warrant they and each of them claimed to hold and exercute said offices. Summons were served on the respondents filed a plea setting up their title to said offices. A general and special demurrer was interposed to said plea, and said demurrer was overruled, and the People elected to abide by such demurrer. The court entered a rule on the People to reply instanter; defaulted the people for want of a reply; found the respondents not guilty, and entered a judgment that the defendants recover from the people on the relation of Charles Agnew their costs, with execution therefor. From that order plaintiff prosecutes this appeal.

We are of the opinion that after the plaintiff elected to abide by its demurrer, thus substituting the case upon a question of law only, the court should not have ruled plaintiff to reply and should not have defaulted plaintiff and should have entered a finding, and that these matters appearing

in the record are surplussage. A final judgment after the demurrer had been overruled and the plaintiff had elected to abide by that demurrer would have been "that the plaintiff take nothing by its suit and that the defendants go hence without day"x, followed by a judgment for costs, which however should not have awarded an execution against the people although it might have awarded an execution against the relator. There is no final judgment, as held in Seghetti v Berry Coal Co. 169 Ill. App. 488; Ajax Rubberx Co. v Gray, 179 Ill. App. 377; People v Johnson 179 Ill. App. 467; Wanom v Fossick, 213 Ill. 70.

As there is no final judgment we have no jurisdiction to decide the merits of the controversy. If we should affirm the trial court and an appeal be prosecuted from our judgment to the supreme court our action would be treated as void, as held in Chicago Portrait Co. v Chicago Crayon Co. 217 Ill. 200. The appeal in therefore dismissed with leave to each party to withdraw all papers filed by it.

Appeal dismissed.

[illegible] reason are surplusage. A final judgment after the [illegible]mmer had been overruled and the plaintiff had elected to [illegible] by that demurrer would have been "like the Danish [illegible] nothing by its suit and that the defendants go hence [illegible]out day", followed by a judgment for costs, which however [illegible]ld not have awarded an execution against the people al-[illegible]ough it might have awarded an execution against the re-[illegible]tor. There is no final judgment, as held in Redpath v [illegible]ry Coal Co. 189 Ill. App. 488; Ajax Rubber Co. v Cuny, [illegible] Ill. App. 277; People v Johnson 175 Ill. App. 447; Verne v [illegible]verse, 214 Ill. 70.

As there is no final judgment we have no jurisdiction [illegible] inside the merits of the controversy. If we should [illegible]ffirm the trial court and an appeal be prosecuted from [illegible] judgment to the supreme court our action would be [illegible]ewed as void, as held in Chicago Portrait Co. v Chicago [illegible]ngraving Co. 217 Ill. 300. The appeal in therefore dismissed [illegible] costs leave to each party to withdraw all papers filed by it.

Appeal dismissed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirteen.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5839

Mary E. Quick, Pltf. in error.

vs Error to DeKalb.

Clayton Patterson, Exor.

&c. Deft. in error.

186 I.A. 223

Whitney P. J.

Mary E. Quick, plaintiff in error hereafter styled plaintiff, filed her petition in the county court of DeKalb county, Illinois, in the matter of the estate of Henry Patterson deceased for the allowance of a child's award under Section 77 of the statute on the administration of estates. An answer was filed to the petition and the cause was heard in the county court and the prayer of the petition denied. An appeal was taken to the circuit court and heard with the same result, and this writ of error is prosecuted from that judgment of the circuit court denying the prayer of the petition. Numerous errors are assigned on the record, but the argument is confined to points which go to the merits of the controversyonly.

Henry Patterson deceased, died testate in DeKalb County Illinois, March 17, 1910 leaving a will which was made April 28, 1902 in which will the following provision was made for Mary E. Quick, the plaintiff, and to which we will have occasion to allude briefly hereafter, "I give and bequeath to my beloved daughter Mary E. Patterson the sum of $150.00 the same to be received and accepted by her inlieu of any award to which she may be entitled out of my estate, and I make the payment of the same a charge upon my real estate." Mary E. Patterson married and became Mary E. Quick on March 4, 1904. Henry Patterson at the time of his death left no widow but left Charles F. Patterson, Herman Patterson, the said Mary E. Quick and Clayton A. Patterson as his children and

Cin. No. 1320

Mary E. Quick, Plff. in error,

vs

Error to Talladega.

Clarence Charles Patterson, Def.

in. Def. in error.

1861 I.A. 293

Statement P. 1.

Mary E. Quick, plaintiff in error herein (hereafter styled plaintiff), filed her petition in the county court of Talladega county, Alabama, in the matter of the estate of Henry Patterson deceased for the allowance of a child's second under Section 77 of the statutes on the administration of estates. An answer was filed to the petition and the cause was heard in the county court and the prayer of the petition denied. An appeal was taken to the circuit court and there with a same result, and this writ of error is prosecuted into that judgment of the circuit court denying the prayer of the petition. Numerous errors are assigned on the record, but the argument is confined to points which go to the merits of the controversy.

Henry Patterson deceased, died testate in Talladega County Alabama, March 17, 1902 leaving a will which was duly April 28, 1902 in which will the following provision was made for Mary E. Quick, the plaintiff, and to which he will have occasion to allude hereafter, "I give and bequeath to my beloved daughter Mary E. Patterson the sum of $100.00 the same to be received and accepted by her in lieu of any award to which she may be entitled out of my estate, and I make the payment of the same a charge upon my real estate." Mary E. Patterson married and became Mary E. Quick on March 4, 1904. Henry Patterson at the time of his death left no widow but left Charles T. Patterson, Clarence Patterson, the said Mary E. Quick and Clayton A. Patterson as his children and

heirs at law. At the time of his death he was a housekeeper and the head of a family. This will was probated and Clayton Patterson named therein as executor, qualified as such and had the estate appraised. The appraisement bill was returned without the allowance of a child's award and this petition was filed by the plaintiff setting up that she was the daughter of the deceased and living with him at the time of his death, her mother being dead, and that she was entitled to a daughter's ~~xx~~ award, and that the appraisers had failed to make an award for her. Henry Patterson lived in Genoa and the plaintiff taught school there. Her husband whom she married March 4, 1904 lived in Rockford and had an office there and a living room and he voted there. Plaintiff was accustomed to go to Rockford at the close of school on Friday afternoon and returned to Genoa on Sunday evening or Monday morning. She lived at her father's home during the week while she was teaching. According to some of the witnesses she did not go to her husband's place of residence more than two or three times in the course of a month. She spent part of the summer vacation with her husband and part with her father. It appears clearly from the evidence that she and her husband were on friendly relations and living and co-habiting together as husband and wife.

This case falls within the rule established in the case of Evans v Evans, 164 Ill. 614, and the reasoning of the court in that case is applicable to this case. "The family relations that existed between appellee and her husband while she was staying with her father were friendly and in no way adverse. The husband of appellee was the head of his family and his domicile and in contemplation of law his wife's domicile and residence so long as their relations were not adverse. * * * * Deceased was a householder and the

home at law. At the time of his death he was a husband and the head of a family. This will was probated and Clayton Patterson named therein as executor, qualified as such and had the estate administered. The appraisement bill was returned without the allowance of a child's award and was petitioned and filed by the plaintiff setting forth that she was the daughter of the deceased and living with him at the time of his death, her mother being dead, and that she was entitled to a daughter's set award, and that the appraisers had failed to make an award for her. Henry Patterson lived in Ohio and the plaintiff always lived there. He married when she married March 4, 1906 lived in Rockford and had an office there and a living room and he voted there. Plaintiff was accustomed to go to Rockford at the close of school on Friday afternoon and returned to home on Monday morning or Monday morning. She lived at her father's home during the week with the family. Plaintiff in the affidavit assess she did not go to her husband's place of residence more than two or three times in the course of a month. The great part of the entire vacation with her husband is spent with her father. It appears clearly from the evidence that she and her husband were on friendly relations and living and visiting together as husband and wife.

This case falls within the rule established in the case of Yarne v Yarne, 164 Ill. 614, and the reasoning of the court in that case is applicable to this case. "The family relations that existed between Arpelia and her husband while she was living with her father were friendly and in no way adverse. The husband of appellee was the head of his family and his domicile and in contemplation of law his state domicile and residence so long as their relations were not adverse. * * * Husband and wife by mutual consent may

head of his family. The question arises, could appellee be a member of two families at the same time. The design of the statute is to furnish an allowance to support members of the family surviving the death of the housekeeper for one year. * * * * So long as the relation of husband and wife existed and neither of them had any intention of breaking such relations, the residence of the husband was in the eye of the law her residence, and she could not be a member of another family."

It is clear to us therefore that the residence of the plaintiff was with her husband in Rockford. The fact that she was teaching school did not indicate any separation between herself and husband and of course, it was convenient for her to board with her father during the week. For the reasons stated in the Evans case we are of the opinion that the petition for an award was properly denied.. It is contended there is no reason for denying the award growing out of the father's will in behalf of the daughter. It will be seen from the will which was made April 28, 1902 before the marriage of plaintiff that this provision in regard to a child's award was made. There is no evidence in the record that this legacy of $150.00 was ever paid to the plaintiff. When she married in 1904, and thereby in legal effect acquired the residence of her husband, she in law ceased to be a member of the family of Henry Patterson, and ceased to be entitled to a child's award as a member of the family of Henry Patterson.

We cannot see that this provision in this will has any bearing on the case. Judgment of the circuit court affirmed.

***

band of his family. The question arises, could a relative or a member of two families at the same time. The design of the statute is to furnish an allowance to support a member of the family surviving the death of one person for one year. * * * So long as the relation of husband and wife existed and neither of them had any intention of breaking such relations, the residence of the husband was in the eye of the law her residence, and she could not be a member of another family."

It is clear to us therefore that the residence of the plaintiff was with her husband in Rockford. The fact that she was teaching school did not indicate any separation between Harsell and husband and of course, it was convenient for her to board with her father during the week. For the reasons stated in the Ewing case, we are of the opinion that the petition for an award was properly denied. It is confirmed, there is no reason for denying the award pursuing as it the father's will in behalf of the daughter.

It will be seen from the will which was made April 22, long before the marriage of plaintiff that this provision in regard to a child's award was made. There is no evidence in the record that this legacy of $100.00 was ever paid to the plaintiff. When she married in 1904, and thereby in legal effect acquired the residence of her husband, she in law ceased to be a member of the family of Henry Detwerer, and ceased to be entitled to a child's award as a member of the family of Henry Detwerer.

We cannot see that this provision in this will has any bearing on the case. Judgment of the circuit court affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5837

The People &c. on the relation

of Myrtle Pope, appellee.

vs Appeal from Co. Ct. Lee.

Fred Jensson, appellant.

Whitney, P. J.

This is a prosecution for bastardy. There was a verdict of a jury finding appellant guilty and judgment on the verdict and this appeal is from that judgment. The errors assigned and argued are, the judgment of the court is not sustained by the evidence, error in giving the 5th. and 6th instructions for the people and in refusing the 2nd. and 3rd. instructions offered by appellant. Anyother errors assigned are presumed to be waived. On the whole we are satisfied that the evidence sustains the verdict. It has the approval of the trial judge and unless there was reversible error in giving or refusing some of the instructions, the judgment ought to be affirmed.

Appellant's refused instructions are substantially covered by those given for appellant. We see no reversible error in giving any of the people's instructions, unless it might be possible in the 5th. people's instruction. That seems to be supported however by Johnson v The People, 140 Ill. 350 and The People v Bibb, 155 Ill. App. 371.

Judgment affirmed.

Gen. No. 3827

The People &c. on the relation

of Myrtle Pope, appellee,

vs. Appeal from Co. Ct. Lee.

Fred Dawson, appellant.

Mailory, J.

This is a prosecution for bastardy. There was a verdict of a jury finding appellant guilty and judgment on the verdict and this appeal is from that judgment. The errors assigned and argued are, the judgment of the court is not sustained by the evidence, error in giving the 5th, and 6th instructions for the people and in refusing the 2nd, and 3rd, instructions offered by appellant. Any other errors assigned are presumed to be waived. On the whole we are satisfied that the evidence sustains the verdict. It has the approval of the trial judge and unless there was reversible error in giving or refusing some of the instructions, the judgment ought to be affirmed.

A appellant's refused instructions are substantially covered by those given for appellant. We see no reversible error in giving any of the people's instructions, unless it might be possible in the 5th. people's instruction. That seems to be supported however by Dawson v The People, 141 Ill. 290 and The People v Mitch, 152 Ill. 4 &c. 371.

Judgment affirmed.

1861 I.A. 224

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5845

The People &c. ex rel

Charles A. Johnson et al

appellee

vs Appeal from Peoria,

John Bushell et al

appellants. 186 I.A. 229

Whitney, P. J.

Appellee filed its bill to enjoin appellant from conducting, operating, running or working his asphalt factory within the residence district of the village of Averyville, Illinois, in a manner to cause dense clouds of smoke to issue therefrom or in any manner causing dense clouds of dust, dirt, pulverized stone or other substances to arise therefrom, or permit any noxious or offensive smell to emanate from said factory which was offensive or dangerous to the health of individuals or the public. The bill was properly verified and a preliminary injunction was issued thereon. An answer was filed to the bill traversing the material allegations of the same, and replication was filed to such answer, and the cuuse was referred to the master to take proofs and report his findings. The master took proofs and reported the same with his findings. Objections were interposed before the master and overruled by him, and exceptions were filed to the master's report in the circuit court and overruled. Dec ree was entered in accordance with the master's report, making the injunction perpetual, from which this appeal is prosecuted.

Appellant was makkng asphalt to put down on the streets of Peoria and operating his plant in the village of Averyville to prepare said asphalt for paving purposes. The plant was located on the west side of the right of way of

Ser. No. 5945

The People Ac. ex rel

Charles A. Johnson et al

appellee

vs

Appeal from Peoria.

John Bushell et al

appellants. **186 I.A. 229**

Whitney, P. J.

Appellee filed its bill in equity against appellants for conducting, operating, managing or assisting in managing a factory within the residence district of the village of Averyville, Illinois, in a manner to cause some degree of noxious to issue therefrom or in any manner creating some degree of dust, dirt, pollution and/or other nuisance to exist therefrom, or permit any nuisance or offensive smell to emanate from said factory which was offensive or dangerous to the health of individuals or the public. The bill was properly verified and a preliminary injunction was issued thereon. An answer was filed to the bill traversing the material allegations of the same, and replication was filed to said answer, and the cause was referred to the master to take proofs and report his findings. The master took proofs and reported. He made his findings. Exceptions were filed to the master's report and overruled by him, and exceptions were filed to the master's report in the trial court and overruled. Decree was entered in accordance with the master's report, making the injunction permanent, from which this appeal is prosecuted.

Appellant was making napkins to put down on the streets of Peoria and operating the plant in the village of Averyville to prepare said napkins for paving purposes. The plant was located on the west side of the right of way of

a branch of the Rock Island Railroad, which ranin a northwesterly and southeasterly direction, and was adjoining the right of way on the west. This was located on a side hill. It was lower to the west of the factory and there were residences there, mostly tenement houses. The land rose to the east and Rock Island avenue was east of said right of way and the houses facing on it east of the avenue were many feet higher than the plant of appellant. The state's attorney on the relation of a large number of persons who owned houses on the east side of Rock Island avenue above the plant filed this bill to enjoin appellant from so operating his plant as to cause smoke and dust and offensive odors. The right had not been established at law holding this factory to be a nuisance before the bill was filed. Appellant contends there is a serious doubt whether any such injury is inflicted upon the homes of the relators, and that therefore it was error to take jurisdiction in a court of equity before the right was established at law.

The case of The Deaconess Home & Hospital v Bontjes 207 Ill. 553 lays down the rule when such a suit may be brought first in equity. Upon consideration of all the evidence we conclude that the case is clearly within the law as announced in the last cited case and that there is no substantial denial but that the property of the relators upon the uphill side and a short distance east of the plant is injuriously affected and the people living therein made ill, and the front part of their houses made ~~inhabitable~~ uninhabitable while the plant is running. There is a contrariety of evidence in this case but nothing that could be called a conflict on the fact of the factory being a nuisance to the property of the relators. The fact that people who lived to the west and on much lower ground did not

a branch of the Rock Island Railroad, which runs a north-westerly and southeasterly direction, and was adjoining the right of way on the west. This was located on a side hill. It was lower to the west of the factory and there were residences there, mostly tenement houses. The land rose to the east and Rock Island avenue was east of said right of way and the houses facing on it east of the avenue were very feet higher than the plant of appellant. The plaintiff's residency on the relation of a large number of persons was owned houses on the east side of Rock Island avenue above the plant filed this bill to enjoin appellant from so conducting his plant as to cause smoke and dust and offensive odors. The right had not been established at law holding this factory to be a nuisance before the bill was filed. A preliminary injunction was made there is a serious doubt whether any such judgment is inflicted upon the homes of the relators, and that therefore it was error to take jurisdiction in a court of equity before the right was established at law.

The case of The Deconcess Home & Hospital v Dwyer 121. 323 lays down the rule when such a suit may be brought first in equity. Upon consideration of all the evidence we conclude that the case is clearly within the law as announced in the last cited case and that there is no substantial denial but that the property of the relators on the west side and a short distance west of the plant is injuriously affected and the people living therein made ill, and the front part of their homes made uninhabitable while the plant is running. There is a contradiction of evidence in this case but nothing that could be called a conflict on the fact of the factory being a nuisance to the property of the relators. The fact that people who lived to the west and on much lower ground did not

suffer from the smoke and odors does not rebut the evidence that those on the up hill side whose windows were on a level with the top of the chimneys of the plant and on the side toward which the prevailing wind blows from the plant are not so affected. We conclude there is no substantial dispute in the evidence but what the relators are so injured that the injunction was properly granted and properly made perpetual. The decree of the court below is affirmed. The motion to tax the cost of additional abstract against appellant will be allowed.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5848

Roy Forney, appellee

vs Appeal from LaSalle.

Crawford Locomotive & Car Co.

a corp. appellant.

Whitney, P.J.

186 I.A. 231

Roy Forney, appellee went to work for the Crawford Locomotive & Car Company, appellant on December 5, 1911, and quit apparently on December 21, 1911, and brought suit for a balance claimed to be due on wages on January 13 1912, before a justice. He recovered before the justice and on a jury trial in the circuit court on appeal also recovered from which judgment in the circuit court this appeal is prosecuted. There is no appearance in this court for appellee. The proof clearly shows by appellee himself, and by his brother who was engaged at the same time, that they were hired to work at piece work and not by the day. When they came to be paid on December 20th, or 21st. they found they had only made about seventy cents a day, and after working one day longer, quit, and served notice that they would sue for wages, and they are now claiming for this work. Other men were working by rhw day and were makkng 22½ cents an hour. These men did not hire by the day, but expressly hired by the piece. There is evidence by appellant tending to show they spent much of the time in idleness instead of at work. The excuse appellee gives is that they asked for the scale and were told that the scale could be posted, and that it was not posted, and they therefore did not know they were making so small an amount. The proof strongly tends to show the scale was posted in the office, and that the plaintiffs were at liberty to go into the office and see it. But, even if this were not so and they wished to know what the scale was

Nov. 5th, 1894.

Roy Forney, appellee

vs Appeal from Marion.

Hawford Locomotive & Car Co.,

A corp., appellant.

Whitney, P.J.

Roy Forney, appellee went to work for the Hawford Locomotive & Car Company, appellant on December 1, 1893, and quit apparently on December 21, 1893, and brought suit for a balance claimed to be due on wages on January 12 1894, before a justice. He recovered before the justice and on a jury trial in the circuit court on appeal also recovered from which judgment in the circuit court this appeal is prosecuted. There is no appearance in this court for appellee.

The proof clearly shows by appellee himself, and by his brother who was employed at the same time, that they were hired to work at piece work and not by the day. When they came to be paid on December 20th, or 21st, they found they had only made about average wages a day, and after working one day longer, quit, and never notice that they could use for wages, and they are now claiming for more work. Other men were working by the day and were making 20 cents an hour. These men did not hire by the day, but apparently hired by the piece. There is evidence by appellant tending to show they spent much of the time in idleness instead of at work. The excuse appellee gives is that they asked for the scale and were told that the scale would be posted, and until it was posted, and they therefore did not know they were making so small an amount. The proof conclusively shows so that the scale was posted in the office, and that the men had at liberty to go into the office and read it. But, even if this fact were not so, it is clear that the men knew that they

before they did work by the piece, they should have stopped working until the scale was shown to them. There is no claim that the prices fixed by the scale were unreasonable or unjust They chose to contract to do piece work. They claim to have been told they could make four to five or six dollars a day by the piece, but upon examining the evidence on direct and cross examination it is clear what they were told was that good workmen had made such wages by the piece. They had an express contract to work by the piece and were paid by the piece and accepted the pay, and there is no possible ground on which they could be permitted to recover a day's wages. The judgment therefore cannot stand. If this were all, the case would have to be remanded in order to permit appellee to recover, if possible, for the one day which he did by piece work after he had been paid. Appellant tells us that that day has been paid for and on motion to retax costs in the court below the attorney for appellant testified he believed, or had been informed by his client, or some of its officers that that one day had been paid, but there was no proof before the jury. We do not however remand for this reason. When appellee made his application for work he signed an agreement in which, among other things, he agreed if he resigned of his own free will he would wait until the regular pay day for his wages, which the application stated is the 15th. of each month. He did leave of his own free will and therefore, he agreed to wait until January 15th. for the balance of his wages, if any. He brought suit for it on the 13th. day of January If he had not been paid for that one day, he sued for it prematurely. All pleas are oral before the justice and considered as pleaded, and this agreement is considered as pleaded in abatement.

Appellee signed this application without reading it according to his testimony, but we are satsified that under Ohlmeyer v American Steel & Wire Co. 168 Ill. App. 195, he is bound by that application and commenced this suit prematurely. Therefore we are not required to remand the case. Judgment reversed.

before they did work by the piece, they should have stopped working until the scale was shown to them. There is no claim that the prices fixed by the scale were unreasonable or unjust. They chose to contract to do piece work. They claim to have been told they could make from to five or six dollars a day by the piece, but upon examining the evidence on direct and cross examination it is clear what they were told was that good workmen had made such wages by the piece. They had an express contract to work by the piece and were paid by the piece and accepted the pay, and there is no possible ground on which they could be permitted to recover a day's wages. The judgment therefore cannot stand. If this were all, the case would have to be remanded in order to permit appellee to recover, if possible, for the work he did by piece work after he had been paid. Appellant tells us that they have been paid for work on which to retain some in the court below in the mistaken expectation that it believed, on new trial, appellant or his client, on some of the pieces that they had been paid, but there was no proof before the jury. We do not further trouble to discuss the question of the sufficiency of the application for work by signed or presented in which, among other things, he stated if he neglected or let work first will he would work until the regular pay day for his hours, which the application stated is the law, at such work. He did leave or his own free will and therefore, it appeared he went until January 18th. For his services in his wages, it is, . He thought his is . . . . . It is not clear it is not that he just been paid the full amount, or just the [illegible] separately, all those are just [illegible] altered as placed, and this agreement is considered as placed in [illegible].

Appellee argued this evidence [illegible] reading is material as its statement, but it was admitted that under Chapter 2 Revisions [illegible] 2, 1887 Ill. App. 187, he is bound by that qualifications and accepted this with [illegible]. Therefore we are not required to consider the [illegible] reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5849

M. C. Forney, appellee

vs Appeal from LaSalle.

Crawford Locomotive & Car

Co. a corp. appellant.

186 I.A. 232

Whitney, P. J.

This appellee was a brother of the appellee in case Genl. No. 5848 decided at this term, and hired out at the same time and quit at the same time, and each testified for the other substantially to the same state of facts as in Genl. No. 5848, and the case is practically and substantially the same as that case and should be decided in this court the same.

The reasons are set forth in case No. 5848 for reversal of the judgment, and the same reasons are to be considered as stated in this case.

Judgment reversed.

Sup. Ct. 1883

E. C. Torney, appellee

vs

Appeal from Dubuque.

Overland Locomotive & Car

Co. v. Guy, appellant.

Bailey, J. 1.

This appellee was a brother of the appellee in case Sup. Ct. 1882 decided at this term, and filed out at the same time and quit at the same time, and each beneficiary for the other substantially to the same state of facts as in case, No. 3848, and the case is practically and substantially the same as that case and should be decided in this court the same.

The reasons are set forth in case No. 3848 for reversal of the judgment, and the same remarks are to be considered as stated in this case.

Judgment reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5850

T. D. Murdock et al

appellants

vs Appeal from Warren.

The Calgary Colonization Co.

appellee.

Whitney, P. J.

T. D. Murdock and R. V. Field, appellants sued appellee on a contract for commissions on the sale of land which contract was oral, and there was a plea of the statute of limitations of the state of Manitoba, where the contract was made, and a demurrer thereto, which was overruled. Thereafter, appellee withdrew its plea of the general issue and appellants elected to stand by their demurrer to said plea. Thereupon, a judgment for costs was entered in favor of appellee against appellants and from that judgment this appeal is prosecuted. Said judgment is not a final judgment. A final judgment would have been that "plaintiffs take nothing by their suit and that defendant go hence without day". (Ajax-Grieb Rubber Co. v Gray, 179 Ill. App. 377 and cases there cited.)

The appeal must therefore be dismissed with leave to each party respectively, to withdraw their papers.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Hen. No. 5859

George H. Molner, appellee

vs Appeal from Will.

Anna Molner, appellant.

186 I.A. 233

Whitney, P. J.

George H. Molner, appellee, filed his bill for divorce charging adultery. An answer denying the charge was filed and replication and the case was heard by the court without a jury. A decree finding appellant guilty of adultery was entered and this appeal is from that decree. Numerous errors are assigned on the record, but inasmuch as appellant makes no reference to any of the errors assigned in her argument except that the decree is not warranted by the evidence, all other errors will be deemed waived.

Appellant attacks the decree on the ground that there is no corroboration of the testimony of the paramour and cites Section 8 of the divorce act, which is the section of the divorce act covering decrees on bills pro confesso. She also cites three appellate court cases on the proposition that the causes of divorce must be proven by reliable witnesses. These cases with the exception of Eames v Eames 133 Ill. App. 665, are cases arising on bills confessed, and in Eames v Eames supra, the point decided was that the unsupported testimony of the party charging adultery when denied by the party accused of adultery and the denial being corroborated was not sufficient to warrant a decree to the party charging adultery.

As we understand the law when a trial is had and issues joined like this one by bill, answer and replication , that the ordinary chancery rules apply and the weight of the testimony is the thing to be considered even though that question may be decided in favor of a party having but one

Ken. Ct. 1929

George H. Molner, appellee

vs

Appeal from Hill.

Anna Molner, appellant.

Hilliary, J. J.

George H. Molner, appellee, filed his bill for divorce charging adultery. An answer denying the charge was filed and replication and the case was heard by the court without a jury. A decree finding appellant guilty of adultery was entered and this appeal is from that decree. Numerous errors are assigned on the record, but inasmuch as appellant makes no reference to any of the errors assigned in her argument except that the decree is not warranted by the evidence, all other errors will be deemed waived.

Appellant attacks the decree on the ground that there is no corroboration of the testimony of the complainant. Section 8 of the divorce act, which is the section of the divorce act covering decrees on bills for divorce, has also often been considerable court comment on the proposition that the causes of divorce must be proven by reliable circumstances. These cases with the exception of Jones v. Jones 143 Ill. App. 665, are cases relating on bills contested, and as Jones supra, the point decided was that the uncorroborated testimony of the party charging adultery when denied by the party accused of adultery and the denial being unsupported was not sufficient to warrant a decree to the party charging adultery.

As we understand the law when a bill is had and issues joined like this one by bill, answer and replication, that the ordinary chancery rules apply. And the weight of the testimony is the thing to be considered even though that question may be decided in favor of a party having but one

witness. The decree is also attacked on the ground that the charge of adultery is not sustained in any case by the testimony of the paramour and authorities are cited on that question.

A review of these cases will show that in a case of a charge of adultery supported only by the testimony of the paramour without any corroborative circumstances and denied by the defendant's testimony, the proof should be held insufficient, if there is nothing in the record tending to discredit the defendant as a witness. In this case the paramour swears positively to the fact. Appellant denies what the paramour says, but she is somewhat discredited in her testimony by the fact that she denies other circumstances tending to incriminate her that are sworn to by other witnesses in corroboration of the paramour, and there is also the proof in the record of other witnesses of her acts showing, or tending to show an adulterous disposition. The fact that she was at the place in question at the time when the act is said to have been committed and was in a confused condition when her husband entered, is testified to by the husband, and this is to some extent corroborative of the testimony of the paramour. The judgment should be affirmed.

Judgment affirmed.

Dibell, Justice, took no part.

tiraqe. The latter is also stated on the ground that the charge of adultery is not sustained in any case by the testimony of the paramour and authorities are cited on that question.

A review of these cases will show that in a case of a charge of adultery supported only by the testimony of the paramour without any corroborative circumstances and denied by the defendant's testimony, the proof should be held insufficient, if there is nothing in the record tending to discredit the defendant as a witness. In this case the paramour swears positively to the fact. Appellant denies what the paramour says, but she is somewhat discredited in her testimony by the fact that she denies other circumstances tending to incriminate her that are sworn to by other witnesses in corroboration of the paramour, and there is also the proof in the record of other witnesses if her acts should be sufficient to show an adulterous disposition. The fact that she was at the place in question at the time when the act is said to have been committed and was in a compromising condition when her husband entered, is testified to by the husband. The law is to some extent corroborative of the testimony of the paramour. The judgment should be affirmed.

Judgment affirmed.

Chief Justice, took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5868

Western Bottle Manufacturing Co.

a corporation. Appellee

vs Appeal from Peoria.

William V. Dufner, Appellant.

186 I.A. 235

Whitney, P. J.

This case comes to this court on appeal in a case which originated in justice court. Judgment was entered in favor of appellee in the court below for $43.58 and this appeal is the result of that judgment. The errors assigned and argued all go in effect to the claim that the verdict is not supported by the law or the evidence, and that the court erred in admitting the testimony of the witness Frank Hall as an expert. The defense interposed was that the bottles whose purchase price is here sued for were not lettered as ordered. There is a conflict of evidence on this question and this defense is met by evidence on which there is conflict that appellant accepted a part of the bottles. The court ruled the law to be that appellant was bound to pay for the whole shipment if it accepted a part, which we think is a correct statement of the law. His acceptance depends upon the question whether he in fact wrote a certain post script on a letter which appellant claims was a forgery. The court over appellant's objection heard expert evidence of a witness familiar with typewriting to the effect that the post script was written with the same machine with which the body of the letter was written. Complaint is made that this expert t stimony was improperly admitted. We see no error in that respect.

There is nothing in the instructions of the court to complain of except the proposition of law above stated, and under the evidence we see no reversible error in that. All questions of fact should be held concluded by the verdict

Cat. No. 5888

Western Notice Manufacturing Co.

a Corporation. Appellee

vs Appeal from Peoria.

William V. Dolan, Appellant.

Wilkins, J. 1.

186 I.A. 235

This case comes to this court on appeal in a case which originated in justice court. Judgment was entered in favor of appellee in the court below for $42.22 and this appeal is the result of that judgment. The errors assigned and argued all go in effect to the claim that the verdict is not supported by the law or the evidence, and that the court erred in admitting the testimony of the witness Frank Hall as an expert. The defense interposed was that the boiler whose purchase price is here sued for was not installed as ordered. There is a conflict of evidence on this question and this defense is met by evidence on which there is conflict that appellant accepted a part of the boiler. The court ruled the law to be that appellant was bound to pay for the whole shipment if it accepted a part, which we think is a correct statement of the law. His acceptance depends upon the question whether he in fact wrote a certain post script on a letter which appellant claims was a forgery. The court over appellant's objection heard expert evidence of a witness familiar with typewriting to the effect that the post script was written with the same machine with which the body of the letter was written. Complaint is made that this expert's testimony was improperly admitted. We see no error in that respect.

There is nothing in the instructions of the court to complain of except the propositions of law above stated, and under the evidence we see no reversible error in them. All questions of fact should be held concluded by the verdict

as there was evidence enough on each question to sustain that verdict.

Judgment affirmed.

The motion by appellee to have the cost of additional abstract taxed against appellant is denied.

**

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5876

Moritz Roth, appellant.

vs

Galva State Bank et al

appellees.

Appeal from Henry.

186 I.A. 236

Whitney, P. J.

On July 24, 1912, Moritz Roth appellant filed a bill against the Galva State Bank, Olaf C. Anderson, Selma Anderson and S. P. Samuelson and Charles C. Wilson, executor of the last will and testament of Charles C. Wilson deceased to have reviewed, reversed and set aside a certain decree entered in said circuit court November 24, 1911, in a certain foreclosure proceeding, wherein the said Galva State Bank was complainant and the said Olaf C. Anderson, Selma Anderson, said Moritz Roth and said Charles C. Wilson were defendants. The said Olaf C. Anderson owed one Nels Mortensen and gave him a note for the amount of said indebtedness, and said Olaf C. Anderson and Selma Anderson, his wife, gave a mortgage to secure said note, which note and mortgage were afterwards sold to the said Galva State Bank. Thereafter the bank filed a bill to foreclose the mortgage and made said Olaf C. Anderson, Selma Anderson, Moritz Roth and Charles C. Wilson defendants and alleged in the foreclosure bill, the execution of the note and mortgage, the purchase of the mortgage and note by the Galva State Bank, a deed by said Anderson and wife to said Moritz Roth, and a covenant in said deed by which said Moritz Roth assumed said mortgage and agreed to pay it. The foreclosure bill prayed for a foreclosure of the mortgage and a sale of the mortgaged premises and that if the proceeds of the sale were not sufficient to pay the bank, that a deficiency decree be rendered against the said Olaf C. Anderson, Selma Anderson and Moritz

Sup. Ct. 1879

Morris Roth, appellant,

vs

Appeal from Kenny.

Calvin Thain et al

respondents.

Whitney, P. J.

On July 24, 1877, Morris Roth commenced this a bill against the Calva State Bank, Olaf G. Anderson, Selma Anderson and S. P. Gunnelson and Charles C. Wilson, executors of the last will and testament of Charles G. Wilson deceased to have reviewed, reversed and set aside a certain decree entered in said circuit court November 24, 1876, in a foreclosure proceeding, wherein the said Calva State Bank was complainant and the said Olaf G. Anderson, Selma Anderson, said Morris Roth and said Charles C. Wilson were defendants. The said Olaf G. Anderson owed one Nels Mortensen and gave him a note for the amount of said indebtedness, and said Olaf G. Anderson and Selma Anderson, his wife, gave a mortgage to secure said note, which note and mortgage were afterwards sold to the said Calva State Bank. Thereafter the bank filed a bill to foreclose the mortgage and with said Olaf G. Anderson, Selma Anderson, Morris Roth and Charles C. Wilson defendants and alleged in the foreclosure bill, the execution of the note and mortgage, the purchase of the mortgage and note by the Calva State Bank, a lien by said Anderson and wife to said Morris Roth, and a covenant in said deed by which said Morris Roth assumed said mortgage and agreed to pay it. The foreclosure bill prayed for a foreclosure of the mortgage and a sale of the mortgaged premises and that if the proceeds of the sale were not sufficient to pay the bank, that a deficiency decree be rendered against the said Olaf G. Anderson, Selma Anderson and Morris

Roth. The defendants were summoned and failed to answer and were defaulted and there was a decree of foreclosure which found the mortgage debt, the sale of the mortgage to the bank, the deed by the Anderson's to said Moritz Roth and the assumption of the mortgage debt by him, and directed a sale of the mortgaged premises, and that if there was a deficiency the complainant in the bill should be entitled to a deficiency decree therefor against the Anderson's and Moritz Roth, appellant herein. Thereafter, there was a sale and report of it and a deficiency decree against appellant for $217.95 with interest thereon from January 30, 1912 which was the date of the deficiency decree. Then the present bill of review was filed asking that that decree be reviewed, reversed and set aside, and appellant had an order staying execution under said deficiency decree until the further order of the circuit court. The Galva State Bank demurred to said bill of review. The demurrer was sustained and the bill of review dismissed. In the bill of review the complainant therein sets out as an affirmative fact not appearing in the former record, sought to be reviewed that before the bill of the Galva State Bank was filed he, Moritz Roth had deeded the property to Charles C. Wilson, who was the owner of the mortgaged premises at the time the bill of foreclosure was filed. The bill therefore, is a bill of review and also a bill in the nature of a bill of review. It is urged that the original proceeding was erroneous as to appellant because it did not allege that he owned the land when the original bill was filed. It is further contended by appellant that no deficiency decree against him could be made in chancery if he did not own the land when the bill of foreclosure was filed and that he therefore was not a proper party defendant in the absence of such an allegation.

[illegible]. The defendants were summoned and failed to answer and were defaulted and there was a decree of foreclosure which found the mortgage debt, the sale of the mortgage to the [illegible], the demand by the defendant to paid [illegible] the assumption of the mortgage debt by [illegible], and directed a sale of the mortgaged premises, and that if there was a deficiency the complainant in the bill should be entitled to a deficiency decree against the defendants [illegible] and Mortie Roth, appellant herein. Thereafter, there was a sale and report of it and a deficiency decree against defendant for $317.25 with interest thereon from January 20, 1931 until the date of the deficiency decree. Then the present bill of review was filed asking that that decree be reviewed, reversed and set aside, and complainant had an order staying execution under bail bondsmen decree until the matter came at the present term. The defendants bail bondsmen demurred to said bill of review. The demurrer was sustained and the bill of review dismissed. In the bill of review the complainant therein sets out as an affirmative fact not appearing in the former record, sought to be reviewed that before the bill of the Malva State Bank was filed he, Mortie Roth had deeded the property to Charles T. Wilson, who was the owner of the mortgaged premises at the time the bill of foreclosure was filed. The bill therefore, is a bill of review and also a bill in the nature of a bill of review. It is urged that the original proceeding was erroneous as to appellant because it did not allege that he owned the land when the original bill was filed. It is further contended by appellant that no deficiency decree against him could be made in chancery if he did not own the land when the bill of foreclosure was filed and that in chancery the [illegible] was a proper party defendant in the foreclosure of such an obligation.

The proceeding is a bill in the nature of a bill of review in that it alleges the fact, not appearing in the original proceeding, that before that bill was filed appellant had deeded the mortgaged premises to Charles C. Wilson. It appears that appellant had a complete remedy in the other case, first, by demurring to the foreclosure bill, if his legal position is correct, and second, by appealing from the deficiency decree entered against him, or third, taking a writ of error and reviewing the whole proceeding for the failure to find his then ownership of the land. Appellant also could have answered the original bill setting up his conveyance of the mortgaged premises to Charles C. Wilson. He still has a right to prosecute a writ of error from the entire proceeding, and if he is right that it should be affirmatively alleged and found that he owned the premises when the foreclosure bill was filed and that in the absence of such an allegation and finding, no deficiency decree could be rendered against him, he must have complete relief upon the writ of error which he may yet sue out.

Perhaps it is not necessary for us to hold, but we do hold, that under the circumstances stated, he was a proper person party defendant in the original bill and that even if he had conveyed the mortgaged premises to Wilson, he was still liable in that case to a deficiency decree, he having by his covenant agreed to pay the mortgage debt.

We are of the opinion that a court of equity will not require the holder of a note and mortgage to first proceed at equity to sell the real estate and then go into a court of law to obtain a judgment against appellant for any deficiency. Appellant was a party in interest in the foreclosure he was interested in seeing that the proceedings were legally conducted and that the advertising and sale of the land was

The proceeding is a bill in lieu of a bill of review in that it alleges the fact, not appearing in the original proceeding, that before that bill was filed a defendant had deeded the mortgaged premises to Charles G. Wilson. It appears that appellant had a complete remedy in the other case, first, by demurring to the foreclosure bill, if his right to redeem is correct, and second, by pleading from the deficiency decree entered against him, or bring, taking a writ of error and reviewing the whole proceeding for the failure to find his true ownership of the land. Appellant also could have answered the original bill setting up his ownership of the mortgaged premises to Charles G. Wilson. He still has a right to prosecute a writ of error from this proceeding, and if he is right that it should be affirmatively alleged and found that he owned the premises when the foreclosure bill was filed and that in the absence of such an allegation and finding, no deficiency decree could be rendered against him, he must have complete relief upon the writ of error which he may yet sue out.

Perhaps it is not necessary for us to hold, but we do hold, that under the circumstances shown, he was a proper person party defendant in the original bill and that even if he had conveyed the mortgaged premises to Wilson, he was still liable in that case to a deficiency decree, as having by his covenant agreed to pay the mortgage debt.

We are of the opinion that a court of equity will not suffer the holder of a note and mortgage to first succeed in equity to sell the real estate and then go into a court of law to obtain a judgment against appellant for any deficiency. Appellant was a party in interest in the foreclosure proceedings and that the advertising and sale of the land was

pursuant to law. He had the right to protect himself by procuring bidders so as if possible to make the land relieve him from his liability, and those rights of his were not at all lost or changed by his conveying the land to Wilson.

Decree affirmed.

****

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5883.

The People for the use of

Ernest Dalton, appellant.

vs. Appeal from Livingston.

C. & A. Ry. Co. appellee

186 I.A. 241

Whitney, P. J.

This is a qui tam action brought before a justice of the peace to recover penalties for the obstruction of highways in the city of Pontiac by appellee under Paragraph 77 of Chapter 114 of the Illinois statutes. A judgment was rendered in the justice court and appealed to the circuit court where the jury found four violations of the act in question, and fined the company $10.00 for each violation, making an aggregate of $40.00 Judgment was entered on the verdict and this appeal is prosecuted from that judgment by appellant.

Numerous errors are assigned as to rejecting and receiving incompetent evidence. A close inspection of the record however, does not show any reversible error in that regard. Complaint is also made that the judgment is contrary to the evidence and that the judgment is for too small an amount. Inasmuch as this judgment must be reversed for the errors hereinafter indicated we make no comment upon the amount of the judgment, leaving that to be fixed upon another trial.

It is urged that the trial court erred in modifying appellant's third instruction and in giving improper instructions on behalf of appellee, and that the instruction as to the form of the verdict was wrong.

Taking up first the instruction which was claimed to be improperly modified, the statute is as follows "No railroad corporation shall obstruct any public highway by stopping any train upon, or by leaving any car or locomotive engine

Gen. No. 5983.

The People for the use of

Ernest Dalton, appellant.

vs

C. & E. Ry. Co. appellee

Appeal from Livingston.

Mulkey, P. J.

This is a qui tam action brought before a justice of the peace to recover penalties for the obstruction of highways in the city of Pontiac by appellee under Paragraph VI of Chapter 114 of the Illinois statutes. A judgment was rendered in the justice court and appealed to the circuit court where the jury found four violations of the act in question, and fixed the company $10.00 for each violation, making an aggregate of $40.00 judgment was entered on the verdict and this appeal is prosecuted from that judgment by appellant.

Numerous errors are assigned as to rejecting and receiving incompetent evidence, a close inspection of the record however, does not show any reversible error in that regard. Complaint is also made that the judgment is contrary to the evidence and that the judgment is for too small an amount. Inasmuch as this judgment must be reversed for the errors hereinafter indicated we make no comment upon the amount of the judgment, leaving that to be fixed upon another trial.

It is urged that the trial court erred in modifying appellant's third instruction and in giving appellee instructions on behalf of appellee, and that the instruction as to the form of the verdict was wrong.

Taking up first the instruction which was claimed to be improperly modified, the statute is as follows "No railroad corporation shall obstruct any public highway by stopping any train upon, or by leaving any car or locomotive engine

standing on its track where the same intersects, or crosses such public highway, except for the purpose of receiving or discharging passengers or freight, or for taking in or getting out cars, or to receive necessary fuel and water, and in no case to exceed ten minutes for each train, car or locomotive engine."

It will be seen that by the statute no car or train can be stopped for longer than ten minutes for any purpose. The court modified the instruction asked by appellant by inserting the words "for more than tenminutes" and did not qualify the instruction in the ways pointed out in the statute, so that the jury were in effect instructed that the law is that a railroad company is guilty of obstructing a street if it stops a car or train over any highway crossing for more than ten minutes.

It will be seen by the first and second instructions given for appellant that the jury were instructed that if a railway company obstructed a highway crossing for any purpose longer than ten minutes, they were guilty of a violation of this statute, but the third instruction as modified by the court clearly announced the law that the railway company could occupy a highway crossing with its cars or trains for ten minutes for any purpose, which is not the law.

Complaint is also made that the court modified appellant's instructions so as to ~~shsinuat~~ instruct the jury to "fix the forfeitures or penalty" instead of saying "assess the damages". Inasmuch as this is a penal statuts we do not see any reversible error in that modification.

the criticism as to appellee's second instruction is that it did not require the jury to find from the evidence in the case by a clear preponderance of the evidence that

stopping on the track where the same intersects, or across any public highway, except for the purpose of receiving or discharging passengers or freight, or for taking in or putting out cars, or to receive necessary fuel and water, and in no case to exceed ten minutes for each train, car or locomotive engine."

It will be seen that by the statute no car or train was to be stopped for longer than ten minutes for any purpose. The court modified the instruction asked by appellant by inserting the words "for more than ten minutes" and did not qualify the instruction in the very phrase set forth, so that the jury were in effect instructed that the law is that a railroad company is guilty of constructing a street, it stops a car or train over any highway exceeding for more than ten minutes.

It will be seen by the first and second instructions given for appellant that the jury were instructed that if a railway company obstructed a highway crossing for any purpose longer than ten minutes, they were guilty of a violation of this statute, but the third instruction as modified by the court clearly announced the law that the railway company could occupy a highway crossing with its cars or trains for ten minutes for any purpose, which is not the law.

Complaint is also made that the court modified appellant's instructions so as to erroneously instruct the jury to "the for injuries or damages incurred or having sustained the damage". Inasmuch as this is a penal statute we do not see any reversible error in that modification.

The criticism as to appellee's second instruction is that it omits the fact that it did not stop the train at the place or a place far enough from the place to avoid the injury. In the case in a clear preponderance of the evidence that

appellee was guilty, and that it included the word "clear" before preponderance. Including the word "clear" seems to be sanctioned by the authority of the appellate court; (C. & E. I. R. R. Co. v The People, 44 Ill. App. 632.) and as to the other criticism made we think the jury could not have been misled into thinking they might find on any basis except from the evidence.

Appellee's fifth instruction is also criticized because by that instruction the jury were told that it was their duty to consider certain evidence pointed out in the instruction. It would have been better to have said by this instruction, "You have the right and it is your duty to consider such evidence in connection with all the other evidence in the case." We should not reverse for the error in this instruction alone.

The instruction as to the form of the verdict is justly subject to the criticism made upon it by appellant, by instructing the jury in substance that it was their duty to fix the same penalty for each violation of the statute that they found from the evidence existed.

For the errors indicated the judgment must be reversed and the cause remanded.

Reversed and remanded.

***

authority was guilty, and that it included the word "clear" beyond reasonable doubt. Including the word "clear" seems to be unnecessary by the majority of the opinions cases; (P. & R. I. R. R. Co. v The People, 44 Ill. App. 626.) and as to the other criticism made we think the jury could not have been misled into thinking they might find on any basis except from the evidence.

Appellee's fifth instruction is also criticized. Among the instructions the jury was told that it was their duty to consider certain evidence pointed out in the instruction. It would have been better to have said by this instruction, "You have the right and it is your duty to consider such evidence in connection with all the other evidence in the case." We should not reverse for this error in this instruction alone.

The instruction as to the form of the verdict is justly subject to the criticism made by appellant, by instructing the jury in substance that if the truth duly is the same penalty for each violation of the statute they found from the evidence existed.

For the errors indicated the judgment must be reversed and the cause remanded.

Reversed and remanded.

***

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5890

James M. Swan, appellant

vs Appeal from City Ct. Sterling.

Charles Lathe, appellee

186 I.A. 244

Whitney, P. J.

James M. Swain, appellant, sued Charles Lathe, appellee on a promissory note for $100.00 before a justice of the peace. We can only gather from the evidence what the defenses were to the note, that were set up in the justice court. Appellant was defeated in the justice court and took an appeal to the city court of Sterling, where he was also defeated, and he brings this case here on appeal. The note being offered in evidence made a prima facie case for appellant. The question to be determined by us is whether or not the evidence in this case shows such a state of facts as to make out a case which would defeat the note. The only oral evidence in the case is that of appellant and appellee. The evidence of appellant would make the note valid. The evidence of appellee would leave the note without a consideration. There does not seem to be any defense mentioned in the evidence of fraud and circumvention in procuring the signature to the note. There is nothing in the record to indicate that appellee is entitled to more credit than appellant, and if their testimony is evenly balanced the note ought to prevail.

It seems that one George Gilson owed appellant $200.00 for which appellant held a chattel mortgage on a mare, which sometime after the giving of the mortgage produced a colt, and the mare and colt or the colt were left with appellee. Gilson went to Colorado on account of ill health and his son Ernest undertook to settle up his affairs and wrote a letter to appellant telling him that this mare and colt were

Can. No. 8890

James M. Swain, appellant

vs

Charles Lathe, appellee

Walker, P. J.

A peal from City Ct. Sterling.

186 I.A. 244

James M. Swain, appellant, and Charles Lathe, appellee on a promissory note for $100.00 before a justice of the peace. We can only gather from the evidence that the defenses were to the note, that were set up in the justice court. ~~xxx xxxx xx xxxxxx xx xxx xxxx xxxxx~~ Appellant was defeated in the justice court and took an appeal to the city court of Sterling, where he was also defeated, and he brings this case here on appeal. The note being offered in evidence made a prima facie case for appellant. The question to be determined by us is whether or not the evidence in this case shows such a state of facts as to make out a case which would defeat the note. The only oral evidence in the case is that of appellant and appellee. The evidence of appellant would make the note valid. The evidence of appellee would leave the note without a consideration. There does not seem to be any defense mentioned in the evidence of fraud and misrepresentation in procuring the signature to the note. There is nothing in the record to indicate that appellee is entitled to more credit than appellant, and if their testimony is evenly balanced the note ought to prevail.

It seems that one George Wilson owed appellant $200.00 for which appellant held a chattel mortgage on a team, which sometime after the giving of the mortgage included a colt, and the mare and colt or the colt were left with appellee. Wilson went to Colorado on account of ill health and his son Ernest undertook to settle up his affairs and wrote a letter to appellant telling him that this mare had colt and that

with appellee and that ~~appellant~~ appellee would settle what was due appellant. This letter amounted in substance to a bill of sale. The essential part of the letter was as follows. "In regard to the balance of the mortgage which is soon due, I left a bay mare and colt in care of Mr. and Mrs. Charles Lathe, Erie, Illinois, Box 176, which I think and trust will settle the amount of the mortgage and interest in full. I transfer the animals to you and you may have them sold if you will it." When this was offered in evidence appellee objected to it as follows, "We object to these letters your honor for the reason they are not written by the parties to this suit and do not pertain to this case." The court declined to rule on the objection until he had heard further, and then, after hearing some evidence, a general objection was interposed, when the letter was again offered, and the objection was sustained, so that the letter never got in evidence. We think in this ruling the court erred. The objection did not go to the authenticity of the letter or to its not being shown it was a letter written by the person who purported to write it, but it was urged simply on the ground it was not a letter written by a party to the suit, and the last objection made to it was only a general objection.

When appellant applied to appellee and told him the situation, appellee agreed with him upon the giving of this note to settle the balance of the chattel mortgage. This made a good consideration for the note if true, and the testimony of appellant is opposed by that of appellee only, who testified that he afterward learned appellant never had a mortgage on the colt. Appellee also testified on the trial that "this colt was bred from the boy's property."

Under the evidence we see no reversible error in

with appellee and that appellant appellee would settle what was due appellant. This letter amounted in substance to a bill of sale. The essential part of the letter was as follows: "In regard to the balance of the mortgage which is been due, I left a boy here and could ill care of it, and that Charles Lathe, Erie, Illinois, Box 172, which I think and trust will settle the amount of the mort age and interest in full. I transfer the animals to you and you may have them sold if you will it." When this was offered in evidence appellee objected to it as follows, "We object to these letters you know for the reason they are not written by the parties to this suit and do not pertain to this case." The court decided to rule on the objection until he had heard further, and then, after hearing some evidence, a general objection was interposed, then the letter was again offered, and the objection was sustained, so that the letter never got in evidence. We think in this ruling the court erred. The objection did not go to the authenticity of the letter or to its not being shown it was a letter written by the person who purported to write it, but it was urged simply on the ground it was not a letter written by a party in the suit, and the last objection made to it was only a general objection.

When appellant applied to appellee and told him the situation, appellee agreed with him upon the trading of this note to settle the balance of the chattel mortgage. This made a good consideration for the note if true, and the testimony of appellant is opposed by that of appellee only, who testified that he afterward learned appellant never had a mortgage on the colt. Appellee also testified on the trial that "this colt was bred from the boy's property." Under the evidence we see no reversible error in

refusing appellant's instructions. Under the evidence herein appellee's third instruction would seem to be misleading, although it may be technically accurate, yet as applied to the evidence in the case it must ~~ha given~~ have given the jury a wrong impression as to the real situation of the parties. For the errors indicated the judgment is reversed and the cause remanded.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5893.

T. E. Lundell, appellee

vs Appeal from Co. Ct. Rock Island.

Minnie Schultz, appellant.

Whitney, P. J.

This is an appeal from a judgment in the court below for $300.00 in favor of appellee in an action of assumpsit brought to recover commissions on the sale of real estate. The pleadings were the common counts and the general issue. A bill of particulars was furnished on motion of appellant as follows "Minnie Schultz to T. E. Lundell - Dr. To finding purchaser of property of Minnie Schultz, known as No. 521, 15th. Street, Moline, Illinois - $300.00"

The errors relied on for a reversal of the judgment are: (1) That the presiding judge was illegally sitting as the judge of the county court of Rock Island county; that he had no jurisdiction to preside as such and his judgment is coram non judice. (2) That the judgment is against the law and the evidence.)3) That upon the facts disclosed by the record, the judgment must necessarily be rendered against appellee and in favor of the appellant. (4) That the court erred in admitting improper evidence on the part of appellee and erroneously overruled a motion of appellant, made at the close of appellee's case to strike out all of the evidence and find for appellant.

A jury was waived and the case was tried by the court. No evidence was offered by appellant. The county judge of Rock Island County having resigned, the county clerk called in the judge who presided at the trial, who was the probate judge. It is contended that the probate judge could not be called in by the county clerk to preside over the county court and that any judgment rendered by him is void.

Gen. No. 22221.

T. E. Lundell, appellee

vs Appeal from Co. Ct. Rock Island.

Minnie Schmidt, appellant.

Whitney, P. J.

This is an appeal from a judgment in the court below for $300.00 in favor of appellee in an action of assumpsit brought to recover commissions on the sale of real estate. The plaintiffs sue the defendant court had the present [illegible]. A bill of particulars was furnished on motion of appellant as follows "Minnie Schmidt to T. E. Lundell - Dr. To finding purchaser of property of Minnie Schmidt, known as No. 321, 15th. Street, Moline, Illinois - $300.00"

The errors relied on for a reversal of the judgment are: (1) That the presiding judge was illegally sitting as the judge of the county court of Rock Island county; that he had no jurisdiction to preside as such and his judgment is void as non judice. (2) That the judgment is against the law and the evidence.)3) That upon the facts disclosed by the record, the judgment must necessarily be rendered against appellee and in favor of the appellant. (4) That the court erred in admitting improper evidence on the part of appellee and erroneously overruled a motion of appellant, made at the close of appellee's case to strike out all of the evidence and find for appellant.

A jury was waived and the case was tried by the court. No evidence was offered by appellant. The county judge of Rock Island County having resigned, the county clerk called in the judge who presided at the trial, who was the probate judge. It is contended that the probate judge could not be called in by the county clerk to preside over the county court and that any judgment rendered by him is void.

Thestatute expressly provides that the county clerk in case of a vacancy in office may call in a county or probate judge to sit. (Sec. 239 A, Chap. 37 - Title "courts" - statutes of 1911.)

There may be minor errors of the court in rulings on evidence, but having been a trial by the court, without a jury, and sufficient competent ~~xxxxxx~~ evidence appearing in the record to sustain the judgment we think no decision can be based on errors and rulings on evidence favorable to appellant. Therefore, it becomes a case in which the judgment if based on sufficient competent evidence, must stand, and the appellant having offered no evidence at the trial. it must be determined by the evidence offered by the appellee. Much is said in appellants argument about the memorandum in writing that resulted from the talk betweenthe agent of the parties, but when the whole record is investigated it appears that the appellant offered to sell her property on certain terms and pay $300.00 commissions to the agent if he would secure a purchaser. It further appears a purchaser was obtained who said he would take the property on the terms proposed. The purchaser afterward came to appellant and tendered the ~~xxxx~~ deed and trust deed required by the terms of the agreement between them, whereupon appellant said she would have nothing further to do about the sale. She refused to accept the papers or look at them.

Finding that the judgment is sustained by sufficient competent evidence, and seeing no reversible error in rulings on evidence, the judgment of the court below is affirmed.

Incidentally, expressly provides that the county clerk in case of a vacancy in office may call in a county or probate judge to act. (See. 328 A, Chap. 37 - title "courts" - statutes of 1911.)

There may be minor errors of the court in rulings on evidence, but having been a trial by the court, without a jury, and sufficient competent ~~evidence~~ evidence a ~~[illegible]~~ in the record to sustain the judgment we think no deviation can be based on errors and rulings on evidence favorable to appellant. Therefore, it becomes a case in which the judgment if based on sufficient competent evidence, must stand, and the appellant having offered no evidence at the trial. It must be determined by the evidence offered by the appellee. Much is said in appellants argument about the memorandum in writing that resulted from the talk between the ~~[illegible]~~ of the parties, but when the whole record is investigated it appears that the appellant offered to sell her property on certain terms and pay $300.00 commissions to the agent if he could secure a purchaser. It further appears a purchaser was obtained who said he would take the property on the terms proposed. The purchaser afterward came to appellant and tendered the ~~[illegible]~~ deed and trust deed required by the terms of the agreement between them, whereupon appellant said she could have nothing further to do about the sale. She refused to accept the papers or look at them.

Finding that the judgment is sustained by sufficient competent evidence, and finding no reversible error in rulings on evidence, the judgment of the court below is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5896

City of Dixon, appellant

vs Appeal from Lee.

Jacob Mayer, appellee

Whitney, P. J.

This is an action brought to enforce an ordinance of the city of Dixon prohibiting the keeping and maintaining of a house of ill fame therein. Proceedings were instituted in the justice court where appellee was tried before a jury found guilty and fined, from which fine and judgment in the justice court the appellee herein appealed to the circuit court of Lee County. On January 15, 1913, a trial was had in the circuit court on the appeal from the justice court and a verdict of not guilty returned and judgment entered thereon, from which judgment of the circuit court this appeal is prosecuted. On the trial in the circuit court appellant introduced certain evidence tending to show that men had sexual intercourse with appellee's wife in his house, and that appellee had been paid therefor. Appellee introduced evidence tending to show that that charge was wholly false. There is no preponderance of the evidence in favor of appellant and no reason is urged or shown why we should interfere with the conclusion of the jury on the evidence that was heard. The court permitted appellant to introduce a transcript of the evidence of a witness who testified for appellant before the justice, who afterward died. This evidence ought not to have been admitted. (I. C. R. R. Co. v Ashline, Admx. 171 Ill. 318.) But the witnesses who knew , should have been required to testify what the dead witness testified to before the justice.

Appellant sought also to introduce the same transcript

Mr. Mr.

City of Dixon, appellant

vs. Appeal from Lee.

James Mayr, appellee

Statement, T. J.

This is an action brought to enforce an ordinance of the city of Dixon prohibiting the keeping and maintaining of a house of ill fame therein. Proceedings were instituted in the justice court where appellee was tried before a jury found guilty and fined, from which fine and judgment in the justice court he appealed herein appealed to the circuit court of Lee County. On January 15, 1914, a trial was had in the circuit court on the appeal from the justice court and a verdict of not guilty returned and judgment entered thereon, from which judgment of the circuit court this appeal is prosecuted. On the trial in the circuit court appellant introduced certain evidence tending to show that he had earnest interrupted the appellee's wife in his house, and that appellee had been with thereafter. Appellee introduced evidence tending to show that that charge was wholly false. There is no preponderance of the evidence in favor of appellant and no reason is urged or shown why we should interfere with the conclusion of the jury on the evidence that was heard. The court properly refused to introduce a transcript of the evidence of a witness who was identified for appellant before the justice, the defendant died. This evidence appears not to have been identified. (R. C. R. R. Co. v Adkins, Adm. 171 Ill. 18.) But the witness who knew , should have been required to identify that the had witness testified to before the justice.

Appellant sought also to introduce the time immaterial

of the evidence of John Cashion, but the same was objected to and the court sustained the objection. This was incompetent for the reasons stated, and in addition thereto there was no proof that Cashion was dead, or out of the State, or beyond the jurisdiction of the court. The proof merely was that a certain officer who tried to find him on subpoena as a witness, failed to find him, and this is insufficient to lay a foundation for the introduction in evidence of what he swore to before the justice.

The court refused to permit a witness to testify as to the general reputation of appellee's house for chastity and morals in that community and that is the main question argued in this case. We hold this evidence was not competent under Parker v The People, 94 Ill. App. 648.

The appellant had passed an ordinance declaring the general reputation should be sufficient to convict in such a case as this. The court refused to admit that ordinance in evidence and refused to permit the evidence of general reputation. A city cannot establish rules of evidence. (Rockford City Railway Co. v Blake, 173 Ill. 354.)

Complaint is made of the refusal of the 5th. instruction offered by appellant. The said 5th. instruction is in substance embodied in the 2nd. instruction for appellant, which was given. The 6th. refused instruction is on the subject of general reputation. This instruction is bad for the reasons hereinabove stated.

The appellant should not be permitted to have a judgment against a citizen based on mere hearsay. The hearsay may haveback of it some person who known some fact, but if any such person exists, he should be called as a witness. Again it may grow out of malice or neighborhood quarrels or [illegible]-

of the evidence of John Dawkins, but the same was objected to and the court sustained the objection. This was incompetent for the reasons stated, and in addition thereto there was no proof that Dawkins was dead, or out of the State, or beyond the jurisdiction of the court. The proof merely was that a certain officer who tried to find him on subpoena as a witness, failed to find him, and this is insufficient to lay a foundation for the introduction in evidence of what he swore to before the justice.

The court refused to permit a witness to testify as to the general reputation of appellee's house for chastity and morals in that community and that is the main question argued in this case. We hold this evidence was not competent under Parker v The People, 84 Ill. App. 468.

The appellant had passed an ordinance declaring the general reputation should be sufficient to convict in such a case as this. The court refused to admit that ordinance in evidence and refused to permit the evidence of general reputation. A city cannot establish rules of evidence. (Rockford City Railway Co. v Blake, 173 Ill. 384.)

Complaint is made of the refusal of the 8th. instruction offered by appellant. The said 8th. instruction is in substance embodied in the 2nd. instruction for appellant, which was given. The 8th. refused instruction is on the subject of general reputation. This instruction is bad for the reasons heretofore stated.

The appellant should not be permitted to have a judgment against a citizen based on mere hearsay. The testimony of everybody of it some person who knows some fact, but if any such person exists, he should be called as a witness. Trifling as may grow out of malice or neighborhood quarrels or [illegible]

malicious scandal. To our mind it would be a destruction of the rights of an individual to permit him to be convicted of an offense against morals and chastity on mere hearsay.

Judgment affirmed.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Genl. No. 5899.

The Thomas Manufacturing Company, a corporation. Appellant. vs. Christ Thede, Jr. Appellee.	Appeal from Mercer.

186 I.A. 248

Opinion by WHITNEY, P. J.

This is an action in assumpsit brought by appellant to recover from appellee for certain goods sold and delivered. The declaration consisted of the common counts, to which was interposed the plea of the general issue, plea of payment and a further special plea which alleged that appellant had not complied with the law of Illinois regulating the admission of foreign corporations. The plea of payment was afterwards withdrawn. A similiter was filed to the general issue and a special replication was filed to appellee's third plea. The replication was one of confession and avoidance of the facts set up in the third plea. Issue being joined, by agreement the parties waived a trial by jury and submitted the issues to the court. The parties then entered into a written stipulation of facts, which, together with the exhibits attached to said stipulation, constituted all of the evidence in the case.

At the time of the making of the contract between appellant and appellee, appellant was a foreign corporation, organized and doing business under the laws of the state of Ohio, and appellee was a resident of the state of Illinois. The contract was a written one, and its terms, so far as

Sup. No. 8802.

The Thomas Manufacturing Company, a corporation, Appellant, vs. Christ Thede, Jr., Appellee.	Appeal from Jersey.

186 I.A. 248

Opinion by WHITNEY, P. J.

This is an action in assumpsit brought by appellant to recover from appellee for certain goods sold and delivered. The declaration consisted of the common counts, in which was interpleaded the plea of the general issue, payment and a further special plea which alleged that appellant had not complied with the law of Illinois regarding the admission of foreign corporations. The plea of payment was afterwards withdrawn. A demurrer was filed to the general issue and a special replication was filed to appellee's third plea. The replication was one of confession and avoidance of the facts set up in the third plea. Issue being joined, by agreement the parties waived a trial by jury and submitted the issues to the court. The parties then entered into a written stipulation of facts, which, together with the exhibits attached to said stipulation, constituted all of the evidence in the case.

At the time of the making of the contract, between appellant and appellee, appellant was a foreign corporation, organized and doing business under the laws of the state of Ohio, and appellee was a resident of the state of Illinois. The contract was a written one, and its terms, so far as

terms, so far as the same are essential to an understanding of the present case were that appellee contracted to purchase three sidedelivery rakes at the price of $46.00 each. Appellee furtjer agreed to sell as many more machines as he could findcustomers for, and appellant agreed to fill any further order received upon the terms and prices agreed on in the contract.

Prior to the time of the making of the contract with appellee, appellant had entered into a contract with the Joliet Warehouse & Transfer Company at Joliet, Illinois, by the terms of which appellant was to ship its goods to such transfer company bundled and packed ready for reshipment, and such goods were to be shipped out by such transfer company upon the orders of appellent or its agents Appellant also by letter authorized appellee about the middle of the summer of 1910, (the season to which the contract applied,)to send in his orders direct to the transfer company for any further machines desired under the contract so that the same might be filled more promptly. By the stipulation of facts it has been agreed that the amount due under said contract is $46.00, with interes thereon at six per cent. from October 1, 1910, and that the same has not been paid. The issue in the case have therefore been narrowed down to two points, first, whether appellant was doing business in Illinois within the meaning of the statute, and second, whether it was engaged in interstate commerce. At the hearing, appellant submitted five propositions of law, all of which were marked "refused" by the court, and to these pro-

terms, so far as the same are essential to an understanding of the present case were that appellee contracted to purchase three sidedelivery rakes at the price of $42.00 each. Appellee further agreed to sell as many more machines as he could financetomers for, and appellant agreed to fill any further order received upon the terms and prices agreed on in the contract.

Prior to the time of the making of the contract with appellee, appellant had entered into a contract with the Joliet Warehouse & transfer Company at Joliet, Illinois, by the terms of which a gallant was to ship its goods to such transfer company bundled and packed ready for re-shipment, and such goods were to be shipped out by such transfer company upon the orders of appellant or its agents. Appellant also by letter authorized appellee about the middle of the summer of 1910, (the season to which the contract applied,) to send in his orders direct to the transfer company for any further machines desired under the contract so that the same might be filled more promptly. By the stipulation of facts it has been agreed that the amount due under said contract is $42.00, with interest thereon at six per cent. from October 1, 1911, and that the same has not been paid. The issues in the case have therefore been narrowed down to two points, first, whether appellant was doing business in Illinois within the meaning of the statute, and second, whether it was engaged in interstate commerce. At the hearing, appellant submitted five propositions of law, one of which were marked "refused" by the court, and to these exce-

positions of law as they were ,arked and filed, was attached a statement of the court which contained its findings in the case. Judgment was rendered against appellent for c osts.

The appellant relies upon the following points for a reversal of the judgment of the court below:- (1) The court erred in its construction of the written stipulation of facts. (2) The finding of the court was against the evidence. (3) The court erred in finding that the business of appellee as the same was transacted in the state of Illinois, was not interstate commerce. (4) The court erred in marking the proposition of law submitted by appellant "refused." (5) The court erred in rendering judgment against appellant.

The court refused the proposition of law on the ground they were not based on the stipulation of facts as he understood them. We are of the opinion that the court misconstrued the stipulation and misconstrued the contractbetween appellant and the warehouse company. The language of the stipulation is conclusive. Where it says that goods were shipped by the transfer company to purchasers in Illinois it says "such purchasers" and that refers to the purchasers referred to in the first part of the sentence, and that is purchasers whose contracts had been acted upon by appellant at its home office in Ohio; and it is only such purchasers whose contracts had been approved at the home office in Ohio who may order

positions of law as they were argued and filed, was attached a statement of the court which contained its findings in the case. Judgment was rendered against appellant for costs.

The appellant relies upon the following points for a reversal of the judgment of the court below:- (1) The court erred in its construction of the written stipulation of facts. (2) The finding of the court was against the evidence. (3) The court erred in finding that the business of appellee as the case was transacted in the state of Illinois, was not interstate commerce. (4) The court erred in sustaining the proposition of law submitted by appellant "refused." (5) The court erred in rendering judgment against appellant.

The court refused the proposition of law on the ground they were not based on the stipulation of facts as he understood them. We are of the opinion that the court misconstrued the stipulation and misconstrued the contracts between appellant and the warehouse company. The language of the stipulation is conclusive. There it says that goods were shipped by the interstate company to purchasers in Illinois it says "said purchasers" and that refers to the warehouse referred to in the first part of the sentence, and that is warehouses where contracts had been entered upon by appellant at its home office in Ohio; and it is only such warehouses where contracts had been approved at the home office in Ohio and by their

direct from the trandfer company.

The contract between appellant and appellee shows appellee did not order a specific number of machines, after the first three, but that he was to order from a certain schudule such machines as he might wish. The misinterpretation of the language of the contract with the warehouse company was that the court inferred that a traveling agent of appellant selling goods in Illonois, might order goods shipped from the transfer company instead of sending the contract first to the general office in Ohio for apprival. This is a misinterpretation of the contract with the transfer company when considered in connection with the stipulation of the agreed facts which is that all of the goods sold in Illinois were to be upon orders approved by appellant in Ohio. In other words, after the contract had been made and approved in Ohio, the agent might order goods from the transfer company to fill that contract instead of from appellant in Ohio.

We think it is clear from the stipulation and from the contracts between appellant and appellee, and between appellant and the transfer company, that it never intended that the transfer company, or its shipping agent in Illinois, could complete any contract between the purchaser and appellant, but the question of price to be paid and the responsibility of the purchaser had to be passed upon at appellant's home office. In other words the order was but

direct from the transfer company.

The contract between appellant and appellee does appellee did not order a specific number of machines, after the first three, but that he was to order from a certain schedule such machines as he might wish. The misinterpretation of the language of the contract with the warehouse company was that the court inferred that a traveling agent of appellant selling goods in Illinois, might order goods shipped from the transfer company instead of sending the contract first to the general office in Ohio for approval. This is a misinterpretation of the contract with the transfer company when considered in connection with the stipulation of the agreed facts which is that all of the goods sold in Illinois were to be upon orders approved by appellant in Ohio. In other words, after the contract had been made and approved in Ohio, the agent might order goods from the transfer company to fill that contract instead of from appellant in Ohio.

We think it is clear from the stipulation and from the contracts between appellant and appellee, and between appellant and the transfer company, that it never intended that the transfer company, or its shipping agent in Illinois, could complete any contract between the purchaser and appellant, but the question of price is to be paid and the responsibility of the purchaser had to be passed upon at appellant's home office. In other words the order was an

a proposition until accepted at the home office, and then it became a contract.

The business did not contemplate that the contract was to be filled immediately, but the purchaser was to ask for his goods at such times as he wanted them, and while ordinarily his request that he wanted certain machines and his contract would be sent to the home office and the home office would then order the goods shipped from the transfer company in Joliet, yet, if there was haste, its agent in this state could direct the transfer company to send on the machine or machines, not as a new sale but in carrying out and filling orders which had previously been accepted and approved at the home office of appellant.

The law governing this question is laid down in Havens & Geddes Co. v. Diamond et al, 93 Ill. App. 557; Hamilton Machine Tool Co. v, Mechanic's Machine Co., 179 Ill. App. 145 and cases therein cited.

We are of the opinion that having a warehouse in Illinois from which its goods were shipped, did not constitute a doing of business in this state within the meaning of our statute and the decisions of our courts; therefore, the appellant was entitled to recover, and the refused propositions of law should have been held. The judgment is therefore reversed.

The jury was waived and we have power to enter final judgment here.

Osgood v. Skinner, 186 Ill. 491, the amount of principal due and the rate of interest under the contract are stipulated. We have power to compute the interest . The amount now due is $56. Judgment is here rendered in favor of the Thomas Manufacturing Company against Christ Phade, Jr. for $56. and cotst, with order for execution.

a proposition until accepted at the home office, and then it become a contract.

The business did not contemplate that the contract was to be filled immediately, but the purchaser was to wait for his goods at such times as he wanted them, and while ordinarily his request that he wanted certain machines and his contract would be sent to the home office and the home office would then order the goods shipped from the transfer company in Joliet, yet, if there was haste, its agent in this state could direct the transfer company to send on the machine or machines, not as a new sale but in carrying out and fulfilling orders which had previously been accepted and approved at the home office of appellant.

The law governing this question is laid down in Morena Gaddis Co. v. Diamond et al, 232 Ill. App. 557; Hamilton Machine Tool Co. v. Leonhardt's Machine Co., 178 Ill. App. 145 and cases therein cited.

We are of the opinion that having a warehouse in Illinois from which its goods were shipped, did not constitute a doing of business in this state within the meaning of our statute and the decisions of our courts; therefore, the appellant was entitled to recover, and the refused propositions of law should have been held.

The judgment is therefore reversed.

The jury was waived and we have power to enter final judgment here.

Reversed.

Osgood v. Skinner, 186 Ill. 421, the accepted principles due and the rule of interest under the contract are stipulated. We have power to compute the interest. The amount due is $50. Judgment is here rendered in favor of the Thomas Manufacturing Company against Orbist Sports, Inc., for $50. and costs, with order for execution.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5831

Roger C. Sullivan, Plaintiff in Error. vs Illinois Publishing and Printing Company, a Corporation, Defendant in Error,	Error to Peoria.

Opinion by CARNES, J.

Plaintiff in Error Roger C. Sullivan, brought an action of libel against the defendant in error Illinois Publishing & Printing Company, a corporation and William Randolph Hearst and Andrew M. Lawrence. The individual defendants were not found service was had upon an agent of the defendant corporation and an amended declaration was filed to which a demurrer was sustained fillowed by judgment for the defendant.

The amended declaration omitting the title read: "Now comes the plaintiff, Rodger C. Sullivan, by his undersigned attorneys , and complains of William Randolph Hearst, Andrew M. Lawrence and Illinois Printing and publishing Company (a corporation), the defendants here, of a plea of trespass on the case.

For that whereas the plaintiff, before and at the time ofthe committing by the defendants of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of the State;- This plaintiff avers that on to-wit, June 1st, 1909 one William Lorimer was declared elected to

No. 3851

Roger C. Sullivan,

Plaintiff in Error.

vs.

Illinois Publishing and Printing Company, a Corporation,

Defendant in Error.

Error to Peoria.

186 I.A. 268

Opinion by CARNES, J.

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The amended declaration setting the libels read:

"Now comes the plaintiff, Roger C. Sullivan, by his undersigned attorneys, and complains of William Randolph Hearst, Andrew M. Lawrence and Illinois Printing and Publishing Company (a corporation), the defendants here, of a plea of trespass on the case.

For that whereas the plaintiff, before and at the time of the committing by the defendants of the several grievances hereinafter mentioned, was a person of good fame, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of the State;- This plaintiff avers that on to-wit, the 1st, 1909 one William Lorimer was declared elected to

the office of United States Senator from the State of Illinois, by the General Assembly of the said State, and on to-wit, the first day of May, 1911, the Senate of the United States, by a certain committee of its members, was investigating the legality of the said election of the said William Lorimer, the said committee was on to-wit, June 26th, 1911, and as well before and after that date conducting its said investigation of said election of said William Lorimer in the city of Chicago, Illinois. Amongst the matters and things alleged, in support of the alleged illegality of the said election of said William Lorimer, to said office, it was charged that he secured his such election by and with the votes of members of said general assembly who belonged to the Democratic party, and that certain of the votes of such members, who then voted for said William Lorimer, for said office, were purchased, to-wit, that the persons casting the same, had been corruptly induced by the payment to them of money, to then and there vote for said William Lorimer for said office, and that to secure, and pay for said votes, a large fund, to-wit, One hundred thousand dollars, had been raised by some persons, and thereafter distributed to some of the members of said General Assembly, who so voted for said William Lorimer for said office as pay, to-wit, as a reward for their having so voted for said Lorimer for said office. The said committee of the said Senate, was then and there investigating the alleged participation of one Edward Hines, of Chicago, Illinois, in the raising and collecting of said alleged corruption fund,

the office of United States Senator from the State of Illinois, by the General Assembly of the said State, and so to-wit, the first day of May, 1911, the Senate of the United States, by a certain committee of its members, was investigating the legality of the said election of the said William Lorimer, the said committee was on to-wit, June 26th, 1911, and as well before and after that date concerning the said investigation of said election of said William Lorimer in the city of Chicago, Illinois.

Amongst the matters and things alleged, in support of the alleged illegality of the said election of said William Lorimer, to said office, it was charged that he secured his said election by and with the votes of members of said general assembly who belonged to the Democratic party, and that certain of the votes of such members, who then voted for said William Lorimer, for said office, were purchased, to-wit, that the persons casting the same, had been corruptly induced by the payment to them of money, to then and there vote for said William Lorimer for said office, and that to secure, and pay for said votes, a large fund, to-wit, One hundred thousand dollars, had been raised by some persons, and thereafter distributed to some of the members of said General Assembly, who so voted for said William Lorimer for said office as pay, to-wit, as a reward for their having so voted for said Lorimer for said office. The said committee of the said Senate, was then and there investigating the alleged participation of one Edward Hines, of Chicago, Illinois, in the raising and collecting of said alleged corruption fund,

and was then and there seeking to ascertain who, if anyone, had contributed to said alleged fund, or to-wit, had been requested to contribute thereto, or to-wit requested to contribute to a fund out of which to reimburse, in part, those who had rained, and as alleged, expended said original fund, for such alleged unlawful purpose.

This plaintiff upon and at all times after January 1st, 1909 and for many years prior thereto, had been and was, a member of the Democratic party, and a resident of the City of Chicago, Illinois, The said William Lorimer upon, since and prior to January 1st, 1909 was and had been a member of the Republican aprty and a resident of the City of Chicago, Illinois, Then and there, at said investigation by said committee on to-wit June 25th, 1911, one H. H. Kohlsaat, of Chicago, Illinois, was a witness and testified as it is alleged, that one Clarance S. Funk of said City, had reported to him the said Kohlsaat that the said Edward Hines had solicited him, the said Clarence S. Funk, to secure from a certain corporation with which he, the said Clarence S. Funk, was associated, the sum of Ten thousand dollars, to be used in part to reimburse those who had raised and used, for the purposes aforesaid, said alleged original fund of One hundred Thousand dollars , and that said Clarence S. Funk, had told him, the said Kohlsaat, that others aside from the above referred to corporation with which said Clarence S. Funk was associated were to be asked to make contributions of money to reimburse those who had raised said alleged original fund of One Hundred Thousand dollars, and that

and was then and there seeking to ascertain who, if anyone, had contributed to said alleged fund, or to-wit, had been requested to contribute thereto, or to-wit requested to contribute to a fund out of which to reimburse, in part, those who had retired, and as alleged, expended said original fund, for such alleged unlawful purposes.

This plaintiff upon and at all times after January 1st, 1909 and for many years prior thereto, had been and was, a member of the Democratic party, and a resident of the City of Chicago, Illinois. The said William Lorimer upon, since and prior to January 1st, 1909 was and had been a member of the Republican party and a resident of the City of Chicago, Illinois. Then and there, at said investigation by said committee on to-wit June 28th, 1911, one H. H. Kohlsaat, of Chicago, Illinois, was a witness and testified as it is alleged, that one Clarence S. Funk of said City, had reported to him the said Kohlsaat that the said Howard Hines had solicited him, the said Clarence S. Funk, to secure from a certain corporation with which he, the said Clarence S. Funk, was associated, the sum of Ten thousand dollars, to be used in part to reimburse those who had raised and used, for the purposes aforesaid, said alleged original fund of the Hundred Thousand dollars, and that said Clarence S. Funk, had told him, the said Kohlsaat, that others said from the above referred to corporation with which said Clarence S. Funk was associated were to be asked to make contributions of money to reimburse those who had raised said alleged original fund of One Hundred Thousand dollars, and that

said Clarence S. Funk had mentioned to him, the said Kohlsaat, the names of Edward Tilden, of Chicago, Illinois, and this plaintiff, as being of those who to-wit had contributed money to make up said alleged original fund of One hundred thousand dollars, or to-wit, who were to be asked to contribute money to reimburse those who had contributed to said alleged original fund. The three persons next named and hereinafter referred to, to-wit, Senator John Broderick and Senator D. W. Holtslaw and John J. McLoughlin were each members of the General Assembly aforesaid, each belonged to the Democratic party, each voted for the said election of said William Lorimer to the office of United States Senator. One of the members then and there as aforesaid, of the aforesaid committee of said United States Senate, hereinafter mentioned, was John W. Kern of Indiana. The said committee was then and there investigating to-wit, whether or not the said election of said William Lorimer was illegal and to-wit, was the result of, to-wit, a corrupt combination of members of the said General Assembly, to-wit, a bipartisan agreement of members thereof, some of whom were members of the Republican party, and whom were members of the Democratic party. Before said committee then and there, there was given evidence that certain persons named Weyerhaeuser, to-wit, certain corporations owned or controlled by certain persons named Weyerhaeuser were interested in the said election of said William Lorimer, and desired to have said William Lorimer elected to said office; and that the said Edward Hines was

said Clarence S. Funk had mentioned to him, the said Tolmsent, the name of Edward Tilden, of Chicago, Illinois, and this plaintiff, as being of those who to-wit had contributed money to make up said alleged original fund of One hundred thousand dollars, or to-wit, who were to be asked to contribute money to reimburse those who had contributed to said alleged original fund. The three persons named and hereinafter referred to, to-wit, Senator John Broderick and Senator D. W. Holstlaw and John J. McLaughlin were each members of the General Assembly aforesaid, each belonged to the Democratic party, each voted for the said election of said William Lorimer to the office of United States Senator. One of the members then and there as aforesaid, of the aforesaid committee of said United States Senate, hereinafter mentioned, was John W. Kern of Indiana. The said committee was then and there investigating to-wit, whether or not the said election of said William Lorimer was illegal and to-wit, was the result of, to-wit, a corrupt combination of members of the said General Assembly, to-wit, a bipartisan agreement of members thereof, some of whom were members of the Republican party, and some were members of the Democratic party. Before said committee then and there, there was given evidence that certain persons named Weyerhaeuser, to-wit, certain corporations owned or controlled by certain persons named Weyerhaeuser were interested in the said election of said William Lorimer, and desired to have said William Lorimer elected to said office; and that the said Edward Hines was

intimate with to-wit, said corporations, and to-wit, with said Weyerhaeuser. The said committee was then and there investigating also whether or not said Edward Hines or said Weyerhaeusers or to-wit said corporations in which said Weyerhaeusers were interested had contributed any money to corrupt members of the said General Assembly to vote for said William Lorimer for said office or had contributed any money to advance the candidacy of said William Lorimer for said office.

The plaintiff avers that on to-wit, June 28th, 1911, the defendants, William Randolph Hearst, Andrew M. Lawrence and the Illinois Publishing & Printing Company (a corporation) were engaged in the business of editing, printing and publishing a certain newspaper in the city of Chicago, called and named, to-wit, Chicago Examiner, to-wit, The Twentieth Century Newspaper, to-wit, Chicago Examiner, The Twentieth Century Newspaper, which said newspaper then and there was circulated and sold in the counties of Cook, Peoria and all other counties of the state of Illinois, and generally circulated and sold throughout the entire United States.

This plaintiff avers further that the said defendants, on to-wit, June 26th, 1911, did, then and there, wickedly and maliciously, intending thereby to bring this plaintiff into public scandal and disgrace, wickedly and maliciously compose, print and publish, and cause to be composed, printed and published in said newspaper, to-wit, Chicago Examiner, to-wit, The Twentieth Century Newspaper,

intimate with to-wit, said corporations, and to-wit, with said Weyerhaeuser. The said committee was then and there investigating also whether or not said General Laws of said Weyerhaeuser or to-wit said corporations in which said Weyerhaeuser were interested had contributed any money to corrupt members of the said General Assembly to vote for said William Lorimer for said office or had contributed any money to advance the candidacy of said William Lorimer for said office.

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to-wit, Chicago Examiner, The Twentieth Century Newspaper, a certain false, scandalous and malicious libel, of and concerning this plaintiff, which libel contains the false scandalous, malicious, defamatory matter following, of and concerning this plaintiff, that is to say:-

Roger Sullivan must tell how he 'delivered' Democrats to Lorimer.

Three questions for the U. S. Senate Committee to ask Roger C. Sullivan ' 1- Why did you telephone Richard Egan of Springfield to find bondsmen for State Senator John Broderick who was indicted for bribing Senator Holstlaw to vote for Lorimer ?

2- Why did your henchman, John J. McLaughlin telephone, 'We will find plenty of Lawyers for Broderick'?

3- Whom did 'Boss' McLaughlin mean by we ?

Former Democratic 'Boss' to be questioned on years of corruption in Illinois, and on deal by which he helped send Republican to Senate.

Senator John W. Kern of Indiana - What is 'Lorimerism'?

H. H. Kohlsaat, Editor and Publisher of the Chicago Record Herald - 'Lorimerism' is the affiliation, co-operation and cohesion of Democrats and Republicans for party pelf and for private pelf . . . . . .
His (Lorimer's) affiliations have always been with one party or the other. He has been elected to office a good many times by Democratic votes as well as by Republican votes '-

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His (Lorimer's) affiliations have always been with one party or the other. He has been elected to office a good many times by Democratic votes as well as by Republican votes '-

From the stenographic report of the proceedings before the committeeof the United States Senate investigating the election of William Lorimer : testimony taken Saturday.

With the foregoing testimony by Mr. Kohlsaat before the Senatorial investigating committee on Saturday and with the latter mention by the same gentleman of the name of Roger C. Sullivan of Illinois, the way has been opened for a full exposure of what really constitutes 'Lorimerism' by the investigators.

Viewed from any angle, the conclusion, remembering the testimony that already has been given before the committee, is almostinevitable that the committee of United States Senators forming the Lorimer inquisitorial body must call Roger C. Sullivan, and must ask of him many pertinent questions regarding his connection with bipartisan Illinois politics for a number of years past.

The mention of Roger C. Sullivan's name by Editor Kohlsaat came about in this wise; Mr. Kohlsaat had told to the committee the story of his conversation with C. S. Funk, General Manager of the International Harvester Company, substantially as he had given his testimony before the Helm investigating committee in Springfield. He had told of Funk's story of his (Funk's) conversation with Edward Hines; of Hine's request for a contribution of $10000 from the Harvester Company to reimburse the coterie of men who had 'underwritten' the Lorimer election to the Senate at a reputed cost of $100000.

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Editor Kohlsaat was asked if any other names were mentioned to him by Funk at that time in addition to the name of Edward Tilden, Mr. Kohlsaat finally answered: 'One of the names was Roger C. Sullivan, who is democratic national committeeman from Illinois, and very influential in Democratic politics'. With these words of Mr. Kohlsaat's the name of the former Democratic 'boss' of Illinois was first brought definitely and finally into the Lorimer investigation.

The part that Roger Sullivan played in the election of Lorimer to the Senate is well understood in Illinois. It was the henchmen of the then 'boss', Democratic members of the Illinois Legislature, whose votes made possible the election of Lorimer. Sullivan is given the credit by all who knew anything about Illinois politics of having put the malodorous Lorimer deal through. (Meaning that this plaintiff had participated in bribing members of the General Assembly of the State of Illinois to vote for William Lorimer for the office of United States Senator.) There is abundant evidence as will be shown now and later that this is true. (Meaning that this plaintiff contributed money which was used to buy the votes of members of the General Assembly for William Lorimer for the office of United States Senator, to-wit, that is, plaintiff was guilty of the crime of bribery.

For instance, the Senatorial Investigating Committee should call Sullivan as a witness and demand of him an explanation of the following series of incidents: When

Editor Kohlsaat was asked if any other names were mentioned to him by Funk at that time in addition to the name of Edward Tilden. Mr. Kohlsaat finally answered: 'One of the names was Roger C. Sullivan, who is Democratic national committeeman from Illinois, and very influential in Democratic politics'. With these words or Mr. Kohlsaat's the name of the former Democratic 'boss' of Illinois was first brought definitely and finally into the Lorimer investigation.

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For instance, the Senatorial Investigating Committee should call Sullivan as a witness and demand of him an explanation of the following series of incidents: When

the Senatorial deadlock was on in Springfield in the winter and spring of 1909, Albert J. Hopkins, then United States Senator from Illinois, needed seventeen votes to win a re-election. It was reported that these votes could be bought for $2000 each. One night, according to reports that already have been published, Fred M. Blount, former president of the Illinois Surety Company, a Hopkins organization, one of the chief supporters of Hopkins, and manager of his campaign, arrived in Springfield. With him he had a small yellow satchel, in which there was supposed to be $34000. Blount, still according to the stories, had no sooner alighted from the train than he was confronted by a number of well known Lorimer men.

Warned not to open satchel.

'Nothing doing', the Lorimer men told Blount 'Go back home and take your little satchel with you. Don't open it up here. If you do, you'll get into trouble.' The satchel was not opened. That same evening, in the St. Nicholas Hotel in Springfield, Roger C. Sullivan called a meeting of his Chicago members of the State Legislature and the down-state members of the Democratic party whom he controlled. To the men assembled, Sullivan said: 'I know that there is a plot on to push over a Republican. I want to tell you something. If any one of you fellows casts his vote for a Republican for United States Senator I'll have him read out of the Democratic party in Illinois.' Three months or so later the votes of these Democrats were cast for William Lorimer, a

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Republican, for the Senate.

Warning issues by Shurtleff.

Is it not the duty of the Senatorial committee to call Roger C. Sullivan and demand of him an explanation of this circumstance to ask him why ? (Meaning that this plaintiff knew of the fact that members of the General Assembly had been bribed to vote for said William Lorimer for the office of United States Senator, and that he had participated in such bribery.)

Again: The next day after this occurence Speaker Shurtleff arose at the joint assemblage of the Legislature, and in ringing tones, said: 'I understand and am credibly informed that there is a movement on foot here to secure the votes of seventeen Democratic members of this Legislature for a Republican for United States Senator. I want to say that the first Democrat who casts his vote for a Republican I will expose from the platform of the house, and I will name the other sixteen men in the plot at the same time.'

For the first time in all that long deadlock Speaker Shurtleff on that day reversed the usual order of things, and ordered the roll of the House to be called first, instead of the Senate.

Shurtleff voted for Lorimer.

A few months later the seventeen members of the Democratic party, and more too, and Speaker Shurtleff himself a Republican, voted for Lorimer.

Republican, for the Senate.

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Is it not the duty of the Senatorial committee to call Roger G. Sullivan and demand of him an explanation of this circumstance to ask him why ? (Meaning that this plaintiff knew of the fact that members of the General Assembly had been bribed to vote for said William Lorimer for the office of United States Senator, and that he had participated in such bribery.)

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A few months later the seventeen members of the Democratic party, and more too, and Speaker Shurtleff himself a Republican, voted for Lorimer.

The Senate investigating committee should ask Sullivan the reason for this. (Meaning that this plaintiff had knowledge, and if interrogated by said committee, could show that members of the said general assembly had been bribed to vote for William Lorimer for the office of United States Senator.)

There is still more evidence that the Investigating Committee might very properly ask Roger C. Sullivan to explain. State Senator John Broderick, a notorious Sullivan henchman , always at the beck and call of Sullivan, was indicted by a grand jury in Sangamon County, and was charged with having given State Senator D. W. Holstlaw a bribe of $2500 to vote for the election of Lorimer. Let the investigating committee of the United States Senate call Roger Sullivan to the witness stand, put him on oath, and ask him why it was that Sullivan, hearing of the indictment of Broderick, called Richard Egan, a Springfield liveryman, on the telephone from Chicago, and said in substance: 'John Broderick is in trouble over this Lorimer mess. He has been indicted. I want you to be ready to go his bail. Get some one else to go on the bond with you.' (Meaning that this plaintiff knew said Broderick had been guilty of bribery in relation to the election of William Lorimer to the office of United States Senator.

Egan on Broderick's bond.

Egan is said to have replied, ' I'LL get my brother -

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There is still more evidence that the Investigating Committee might very properly ask Roger C. Sullivan to explain. State Senator John Broderick, a notorious Sullivan henchman, claims at the best (?) of Sullivan, was isolated by a great party in Chicago Friday, and was charged with having given State Senator D. W. Holstein a bribe of $5000 to vote for the election of Lorimer. Let the investigating committee of the United States Senate call Roger Sullivan to the witness stand, put him on oath, and ask him why it was that Sullivan, bearing of the indictment of Broderick, called Michael Egan, a Sullivan-field livery man, on the telephone from Chicago, and said in substance: 'John Broderick is in trouble over this Lorimer mess. He has been indicted. I want you to be ready to go his bail. Get some one else to go on the bond with you.' (Meaning that this plaintiff knew said Broderick had been guilty of bribery in relation to the election of William Lorimer to the office of United States Senator.

Egan on Broderick's bond.

Egan is said to have replied, ' I'll get my brother -

in-law Ben Kirlin to go on with me.' And he did.

Why, let the committee ask, was Sullivan so interested in the case of John Broderick ?

Here is something else that the Investigating Committee might ask Roger C. Sullivan, when it calls him as a witness in the Lorimer case. 'Tom' Dawson, a Chicago lawyer and former State Senator, following the indictments of the Democratic members of the legislature in Sangamon county, went to Springfield to represent all of the Democratic members who had got into trouble. It might be interesting to ask Mr. Sullivan who it was that sent Dawson to Springfield on this errand. (Meaning this plaintiff had engaged an attorney to defend and protect those charged with bribery in relation to the election of William Lorimer to the office of United States Senator for the reason that this plaintiff had himself participated in such bribery and feared exposure by those so bribed if he did not assist in defending them against criminal prosecution for participating in such bribery.) Dawson was, and is, a Sullivan man in politics. He had been a State Senator, and was supposed to 'know the ropes'. John Broderick had furnished bail as arranged by Sullivan. Dawson called 'Boss' John J. Mc Laughlin, another Sullivanite, on the telephone, and said 'Pat O'Donnell (Attorney Patrick H. O'Donnell of Chicago) tells me to send Broderick to St. Louis, so he won't talk too much. Broderick kicks on going

to St. Louis; says he won't go to St. Louis; says he is going back to Chicago. What shall we do with him ?'

Told to ignore O'Donnell.

'Boss' McLaughlin answered Dawson as follows: 'Let Broderick do whatever he wants to. Don't pay any attention to Pat O'Donnell. We can hire all the lawyers we want. Send him back here if he wants to come.' The Investigating Committee has the right to ask Roger C. Sullivan about this circumstance, and ask him to explain who is meant by 'we'. There are many other things in connection with Sullivan's bi-partisan connection with Illinois politics that might very properly be inquired into. The Senatorial Investigating Committee is a law unto itself. It is responsible only to the United States Senate. It is bound by no hard and fast rules of evidence. It can - and has been - hearing evidence that throws a light on the election of Lorimer, and that at the same time has no direct bearing on the subject of corruptive influences that are said to have encompassed the election of Lorimer.

Widest latitude in testimony.

The testimony already given by Editor Hinman of the Chicago Inter-Ocean; Editor Kohlsaat of the Chicago-Record-Herald; Cyrus H. McCormick, President of the International Harvester Company; Edgar A. Bancroft, General Counsel of the International Harvester Company; former United States Senator Albert J. Hopkins; former Governor Richard Yates - the testimony given by these men in response to the questions put to them, shows conclusively that the present committee, unlike the former

So Mr. Lewis, says he won't go to it. Lowing says he is going back to Chicago. What shall we do with him?'

Told to ignore O'Donnell.

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committee, is going to allow the widest latitude in the testimony. The bars have been thrown down. With this in mind, it is plain to see why the calling of Roger C. Sullivan and a grilling of the former Democratic boss not only on the Lorimer election, but also on matters of Illinois and Chicago bi-partisan politics in general is in order. Roger C. Sullivan's corporation affiliations are well known. Roger C. Sullivan's double dealing in the politics of his state and city is well known. A little more than four years ago Sullivan threw his strength from Edward F. Dunne to Fred A. Busse in the mayorality campaign. Busse, a corporation man as strong as Dunne was at that time anti corporation, was elected by the aid of the democratic votes thrown by Sullivan . Why ?

After Lorimer's election to the Senate Sullivan's strength was thrown for Lorimer's man, William J. Moxley, for the lower house of Congress in the Lorimer district. Edmond J. Stack was the regular democratic nominee; Dr. Carl Barnes was the nominee of the Independent Republicans. Moxley was elected by the aid of Sullivan votes. Was this a part of the deal by which Lorimer secured his election to the United States Senate ? That the district is Democratic is evidenced by the election of Stack, Sullivan having been erased as a power in politics.

These are only a few of the circumstances into which the Senatorial Committee might well inquire.

committee, is going to allow the widest latitude in the investigation. The lists have been thrown open. With this in mind, it is fair to see why the calling of Roger C. Sullivan and a grilling of the former Democratic boss not only on the primary election, but also on matters of Illinois and Chicago bi-partisan politics in general is in order. Roger C. Sullivan's suspected affiliations are well known. Roger C. Sullivan's double dealing in the politics of his state and city is well known. A little more than four years ago Sullivan threw his strength from Edward T. Dunne to Fred A. Busse in the mayoralty campaign. Busse, a corporation man as strong as Dunne was at that time anti corporation, was elected by the aid of the Democratic votes thrown by Sullivan. Why?

After Lorimer's election to the Senate Sullivan's strength was thrown for Lorimer's man, William E. Mosley, for the least house of Congress in the Lorimer district. Edward J. Brach was the regular Democratic candidate. Dr. Carl Barnes was the nominee of the Independent Republicans. Mosley was elected by the aid of Sullivan votes. Was this a part of the deal by which Lorimer secured his election to the United States Senate? That the district is Democratic is evidenced by the election of Brach, Sullivan having been ousted as a power in politics.

These are only a few of the circumstances into which the Senatorial Committee might well inquire.

And further said defendants did then and there, in the same newspaper, draw, construct, print, publish and circulate a certain cartoon, intending to represent this plaintiff and said William Lorimer, and in to-wit Ten thousand copies of said papers, did cause to be printed over said cartoon, the following: 'Senate after bi-partisan secrets. Weyerhaeusers also to be called.(The said cartoon shows two men, one bearing a tag marked Lorimer (meaning that the person so marked was intended to represent and depict said William Lorimer), and the other of said men bore a tag marked Sullivan (meaning that the person so marked was intended to represent and depict this plaintiff). Both of said men are there represented and shown to be standing - embracing each other, back of what is intended to represent a ballot box, and each is shown in the act of depositing a ballot in said box, which ballots are marked as follows, to-wit: The one represented as being cast by the figure marked, to-wit, tag, Lorimer is marked vote for Sullivan; the one represented as being cast by the figure, marked, to-wit, tag, Sullivan, is marked, vote for Lorimer. Above said figure in said cartoon appears the word PALS - : In and by said cartoon the said defendants, then and there, falsely, maliciously and wilfully intended to say, and did falsely say and charge that this defendant cast his vote to-wit his ballot, at public elections in favor of candidates for public office supported by said William

Lorrimer and his political associates, and that this plaintiff used his influence with his political friends and political associates to cause them to vote for those candidates for public office, whose election was favored by said William Lorimer. This charge is false, the defendants knew it to be false and untrue, and knowing it to be false did wilfully and maliciously print and publish said cartoon.

This defendant did not favor the election of Fred A. Busse as mayor of Chicago against Edward F. Dunne, nor advocate the candidacy of said Fred A. Busse. This charge is false. The defendants knew it was false.

They, then and there, wilfully and maliciously published and circulated such charge as aforesaid, knowing it was false and untrue.

This defendant did not aid in the election of William T. Foxley as Congressman over Edmund J. Stack. This charge is false. The defendants then and there knew it was false. The defendants, knowing such charge to be false, did wilfully and maliciously publish and circulate the same as aforesaid.

This defendant did not contribute any money to any fund to be used in any manner to bring about the election of William Lorimer to the office of United States Senator aforesaid. This defendant did not assist, directly or indirectly, in creating, advising ~~advertising~~ or ratifying the

Lorimer and his political associates, and that this plaintiff used his influence with his political friends and political associates to cause them to vote the three candidates for public office, whose election was favored by said William Lorimer. This charge is false, the defendants knew it to be false and malicious, and further it to be false did willfully and maliciously publish and circulate said cartoon.

This defendant did not favor the election of Fred A. Busse as mayor of Chicago against Edward F. Dunne, nor advocate the candidacy of said Fred A. Busse. This charge is false. The defendants knew it was false.

They, then and there, willfully and maliciously published and circulated such charge as aforesaid, knowing it was false and untrue.

This defendant did not ask or the election of William F. Healy as Commissioner of Sewers. This charge is false. The defendants then and there knew it was false. The defendants, knowing such charge to be false, did willfully and maliciously publish and circulate the same as aforesaid.

This defendant did not contribute any money to any fund to be used in any manner to drive about the election of William Lorimer to the office of United States Senator aforesaid. This defendant did not aiding, directly or indirectly, in electing, ~~contributing~~ or retaining the

gathering of any fund to aid in bringing about the election of said William Lorimer to the office of United States Senator aforesaid, nor in creating any fund to reimburse any persons who may have gathered a fund for such purpose.

This defendant did not bribe, directly nor indirectly, any person or persons members of the General Assembly of said State to vote for, to-wit, to aid or advance the election of William Lorimer, to the office of United States Senator aforesaid, nor to-wit, to cause others to favor his such election, or to-wit to vote in said General Assembly for his election to said office of United States Senator. This defendant did not advise, nor solicit any member of said General Assembly to vote to elect said William Lorimer to said office.

These charges and each of them are and were false. The defendants then and there knew they were false. These defendants printed, published and circulated such charges as aforesaid, and each of them, wilfully and maliciously against this plaintiff with the intent, then and there, as aforesaid to defame and injure this plaintiff and hold him up to public disgrace, hatred and contempt.

The said defendants, then and there circulated and distributed a large number of the copies of said newspaper, containing said false and defamatory matter, to the number of to-wit, one hundred thousand in each of the following counties of the State of Illinois, to-wit, Cook, Peoria, La Salle, and McLean, and a large number,

gathering of any fund to aid in bringing about the election of said William Lorimer to the office of United States Senator aforesaid, nor in creating any fund to reimburse any persons who may have gathered a fund for such purpose.

This defendant did not bribe, directly nor indirectly, any person or persons members of the General Assembly of said State to vote for, to-wit, to aid or advance the election of William Lorimer, to the office of United States Senator aforesaid, nor to-wit, to cause others to cast his such election, or to-wit to vote in said General Assembly for his election to said office of United States Senator. This defendant did not advise, nor solicit any member of said General Assembly to vote to elect said William Lorimer to said office.

These charges and each of them are and were false. The defendants then and there knew they were false. These defendants printed, published and circulated such charges as aforesaid, and each of them, wilfully and maliciously against this plaintiff with the intent, then and there, as aforesaid to defame and injure said plaintiff and hold him up to public ridicule, hatred and contempt.

The said defendants, then and there circulated and distributed a large number of the copies of said newspaper, containing said false and defamatory matter, in the number of to-wit, one hundred thousand in each of the following counties of the State of Illinois, to-wit, Cook, Peoria, La Salle, and Macon, and a large number,

to-wit, one Thousand copies thereof, in each city of the United States.

The said articles, and said cartoons, were fales, untrue and defamatory of this plaintiff. The defendants then and there knew said articles were false, untrue and defanatory of this plaintiff, and they wilfully and maliciously so published and circulated them because they were false, untrue and defamatory.

By means of committing of said several grievances by the defendants the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace. To the damage of the plaintiff of ($25000.00) Twenty-five Thousand Dollars, and therefore he brings his suit, etc.

Defendant by special demurrer to the declaration raised the question whether the language referred to in the innuendoes could be reasonably given the construction and meaning placed on it by the pleader. If it could then the article charged plaintiff with the commission of a crime and was of course actionable. If it could not, then the further question arose on general demurrer whether notwithstanding the misinterpretation of the language the article is still a libel.

It was early held in this state that the pleader might by innuendoes restrain and limit the obvious meaning of words actionable per se. Sanford v. Gaddis, 13 Ill.,

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The said articles, and said cartoons, were false, untrue and defamatory of this plaintiff. The defendants then and there knew said articles were false, untrue and defamatory of this plaintiff, and they wilfully and maliciously so published and circulated them because they were false, untrue and defamatory.

By means of committing of said several grievances by the defendants the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace. To the damage of the plaintiff of ($25000.00) Twenty-Five Thousand Dollars, and therefore he brings his suit, etc.

Defendant by special demurrer to the declaration moved the question whether the language referred to in the innuendoes could be reasonably given the construction and meaning placed on it by the pleader. If it could then the article charged plaintiff with the commission of a crime and was of course actionable. If it could not, then the further question arose on general demurrer whether notwithstanding the disinterpretation of the language the article is still a libel.

It was early held in this state that the mere right by innuendoes restrain and limit the ordinary meaning of words actionable per se. Barfoot v. Gaddis, 12 Ill.,

329. Where by innuendo a particular meaning is ascribed to words the plaintiff is not at liberty to reject that meaning upon the trial and resort to another. The innuendo gives a character to the libel which becomes a part of the issue. Strader et al v. Snyder, 67 Ill. 404. To same effect see Merrick v. Tribune Co., 108 Ill. App. 244; and Slaughter v. Johnson 181 Ill. App. 693. It was held in Schmisseur v. Kreilich, 92 Ill. 347, that where words are actionable per se without colloquium or innuendo that the innuendo may be rejected as surplusage, and this case is cited in 25 Cyc. 453, in support of the text that "The innuendo may be treated as surplusage where it is used in connection with words which are unequivocal and actionable per se". The conclusion reached by some of the courts seems to be that if the innuendo is entirely unnecessary it may be rejected, but if it is necessary it cannot be rejected, and if the plaintiff fails to show the particular meaning placed on the words by the innuendo, he takes nothing even though by their true meaning they are actionable; and by other courts it seems to be held that however unnecessary the innuendo may be if the pleader chooses in that way to ascribe meaning to words he is bound by the meaning so chosen and cannot be heard to say that the words were spoken or written with another and different meaning rendering them actionable. It seems to us the courts of this State are committed to the latter position.

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There are six innuendoes in which clauses of the article are charged to mean: - that plaintiff had participated in bribing members of the General Assembly; that he had contributed money used to buy the votes of members; that he knew members had been bribed and participated therein; that he had knowledge and could show that they had been bribed; that he knew Broderick was guilty of bribery; that he had engaged an attorney to protect those charged with bribery for the reason that he, himself, had participated in such bribery and feared exposure by those so bribed if he did not assist in defending them.

We do not think the trial court erred in holding that the language could not be reasonably understood as construed by these innuendoes. Each part of the article must be construed in connection with all the rest of it and the words taken in the sense which the readers of common and reasonable understanding would ascribe to them. People v. Fuller, 238 Ill. 116.

The publication, read in the light of the averments of facts in the declaration, means that there had been a prolonged heated contest in the Legislature over the election of a United States Senator, that a Republican had been elected by the aid of votes of Democratic members, that bribery of those members had been charged and some of them had been indicted on that charge, that plaintiff was a leader in the Democratic party and had used his power and influence to procure for the successful

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candidate the votes of members controlled by him and was active in procuring bail and counsel for those that had been so indicted, that theretofore he had joined in bi-partisan movements in public elections and was a friend of the successful candidate in this election. It is common knowledge that in all political contests there are men on each side presumed to have and exercise much influence and power; that the unsuccessful party often charges its defeat to fraud and bribery of voters, and the public is much inclined to believe the charge and sometimes holds the leaders responsible and sometimes has no suspicion that they are guilty, all depending on the supposed character of the leader. The average reader knows the reputation of prominent men mentioned in such publications and guesses and judges accordingly. A moments reflection will recall to any one the names of political leaders whose names mentioned as was plaintiffs in the article in question would not arouse the least suspicion of misconduct, and of other leaders who would be suspected if it was known they had any connection with a contest. We assume plaintiff was, as is alleged in the declaration, a person of good name, credit and reputation, enjoying the esteem and good opinion of his neighbors and other worthy citizens of the State. And so assuming we deem it unreasonable to say that the article or any clause of it would be read as charging him with bribery or guilty connection with any attempt to bribe members of the Legislature.

candidate the votes of members controlled by him and was active in procuring bail and counsel for those that had been so indicted, that therefore he had joined in bipartisan movements in public elections and was a friend of the successful candidate in this election. It is common knowledge that in all political contests there are men on each side presumed to have and exercise much influence and power; that the unsuccessful party often charges the leaders to fraud and bribery of voters, and the public is much inclined to believe the charge and sometimes finds the leaders responsible and sometimes has no suspicion that they are guilty, all depending on the supposed character of the leader. The average reader knows the reputation of prominent men mentioned in such publications and guesses and judges accordingly. A moments reflection will recall to any one the names of political leaders whose names mentioned as was plaintiffs in the article in question would not arouse the least suspicion of misconduct, and of other leaders who would be suspected if it was known they had any connection with a contest. We assume plaintiff was, as is alleged in the declaration, a person of good name, credit and reputation, enjoying the esteem and good opinion of his neighbors and other worthy citizens of the State. And so assuming we deem it unreasonable to say that the article or any clause of it could be read as charging him with bribery or guilty connection with any attempt to bribe members of the Legislature.

If the special demurrer was properly sustained, as we hold it was on the ground that the language referred to in the innuendoes could not reasonably be given the construction and meaning so placed on it, we think it follows that the general demurrer was also properly sustained, even under the rule that the innuendoes may be rejected as surplusage and the article read without them, which we do not regard the proper rule in this case. No special damage is alleged and the words are not charged to be published with reference to plaintiffs calling or trade. The question is whether the language is actionable per se. It is true that an action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt or ridicule, even though the same words spoken would not have been actionable, Cerveny v. Chicago Daily News Co., 139 Ill. 345; and it is not essential that the words should involve an imputation of crime. But defamatory words to be libelous per se must be of such a nature that the Court can presume as matter of law that they will tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule or cause him to be shunned and avoided. 25 Cyc 253. The court ought to be able to see that a party's reputation was liable to be injured in some serious and material manner; Foster v. Bone, 38 Ill. App. 613. While to publish of one that he is an anarchist is actionable per se as held in Cerveny v. Chicago Daily News Co. supra, still as intimated in that case

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it is not actionable per se to charge one with a political faith that is not subversive of law and order however unpopular that faith might at the time be in the community where the charge was published. An individual may be brought into contempt or ridicule by professing absurd principles, but when we remember that every political belief is absurd to many, and many of them absurd to large communities, it is readily seen that false charges as to one's political belief and religious convictions in the absence of special damages should not be held actionable. A false charge that a man was a democrat might injure his business in a republican community or aid it in a democratic community and if he suffered loss from such charge he might on proper pleading and proof recover damages but that is not the question here. There is much difference of opinion on the question of duty to adhere strictly in public matters to the principles of the political organization to which one belongs. It is by many regarded ridiculous and absurd to disregard party lines and assume to be wiser than the party; by others it is deemed the part of great wisdom and virtue to at times disregard those lines. We do not understand that it would be actionable per se to charge a man with entertaining and acting on either of those beliefs. It is not a charge from which the law would p presume damage but would require special damage to be averred and proven before permitting a recovery.

The action is brought to recover damages for injury to reputation, whether there is such injury depends upon

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what the readers of the article were induced by it to believe, and that depends much on the time, place and occasion. A written report of words spoken in the Gridiron Club might incline the reader to admiration of the person alluded to, while if they had been spoken in some other public meeting they would excite hatred and contempt. The public is familiar with cartoons of public men publishing their natural defects, but such cartoons do not expose these men to public hatred, contempt, ridicule or financial injury because they have become so common that the public does not take them in that sense. But a cartoon of the most prominent man in the nation that would be understood in no bad sense might expose a country merchant or justice of the peace to much public ridicule - all because of the license of certain times, places and occasions. That political leaders are subject to much criticism and ridicule not taken seriously by the reading public, should not be lost sight of in determining whether any given article tends to impeach the honesty, integrity, virtue or reputation of a person and thereby to expose him to public hatred, contempt, ridicule or financial injury, which it must be held to do to fall within our Statutory definition of libel.

Defendant in error first entered a special appearance and filed a plea to the jurisdiction of the court, averring that at the time when etc, it did not reside and was not found in Peoria County, but did reside and might be found in the county of Cook. A demurrer to this plea

what the readers of the article were induced by it to believe, and that depends much on the time, place and occasion. A written report of words spoken in the Buildiron Club might lead the reader to conclude that the person alluded to, while if they had been spoken in some other public meeting they would excite hatred and contempt. The public is familiar with personnel of public-ing their natural defects, but such cartoons do not expose these men to public hatred, contempt, ridicule or financial injury because they have become so common that the public does not take them in that sense. But a cartoon of the most prominent man in the nation that would be understood in no bad sense might expose a country merchant or justice of the peace to much public ridicule - all because of the idiosyncrasies of certain there, place and occasion.

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Defendant in error first entered a special appearance and filed a plea to the jurisdiction of the court, asserting that at the time when etc, it did not reside and was not found in Peoria County, but did reside and might be found in the county of Cook. A demurrer to this plea

was sustained and cross error is assigned on that action of the court. There was service on an agent of the defendant found in Peoria County and return in due form. There is no question that the service and return are prima facie good under Section 8 of our Practice Act, providing for service on provate corporations. It is claimed the plea is good under Section 6 of that Act providing "It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except" certain actions not material here. Midland Pac. Ry. Co. v. McDermid, 91 Ill. 170; and Silsbee v. Quincy Hotel Co., 30 Ill. App. 204, are cited as authority for the proposition that where a corporation does not do business in a c county and has no office or agent located there service can not be had on an officer or agent who happens to come within the county for his private business or pleasure. We do not think the plea raised that question. The service was prima facie good, no question is made but the writ was served on an officer of the defendant corporation , and if it be true that it was not doing business in Peoria county and had no office or agent located there and the agent served was there on his own business or pleasure, the fact should have been more specifically pleaded. The general averment of nonresidence was not sufficient. Willard v. Zehr, 215 Ill. 148. The court did not err in sustaining the demurrer to the plea.

The judgment is affirmed.

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The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5834.

D. C. Miller,
appellant.
vs
Eva S. Liljestrom,
appellee.

186 I.A. 275

Appeal from the County Court of Knox County.

Opinion by CARNES, J.

Appellant a lawyer sued appellee an uneducated working woman in assumpsit to recover half the value of real estate which she took as sole devisee named in the will of her father who died in 1911. It appears that x appellee was an illegitimate child, and while she lived with or near her father and was recognized and treated by him as a daughter, she for several years had known that she could not inherit his property, and he, unfamiliar with business affairs, delayed and neglected to make a will in her favor. She discussed the matter with appellant at his home in May 1905, and he drafted for her a paper for her father to sign which he entitled "The acknowledging and owning of a child", but the signature was not obtained. Appellant claims that afterwards he employed a mutual friend of himself and the testator to labor with the old man to make a will giving appellee all of his property, and that the will executed was the result of the persuasion so prompted, and that he had an oral contract with appellee made in

Ex. Rel.	
D. D. Miller,	
appellant.	
vs	Appeal from the County Court of
Mrs S. Bilyeskom,	Knox County.
appellee.	

O p i n i o n a y C a r t e r, J.

Appellant a lawyer sued appellee in unadmitted working woman in assumpsit to recover half the value of real estate which she took as sole devisee named in the will of her father who died in 1911. It appears that appellee was an illegitimate child, and while she lived with or near her father and was recognized and treated by him as a daughter, she for several years had known that she could not inherit his property, and he, unfamiliar with business affairs, delayed and neglected to make a will in her favor. She discussed the matter with appellant at his home in May 1906, and he drafted for her a paper for her father to sign which he entitled "The acknowledging and owning of a child", but the signature was not obtained. Appellant claims that afterwards he employed a mutual friend of himself and the testator to labor with the old man to make a will giving appellee all of his property, and that the will executed was the result of the persuasion so prompted, and that he had an oral contract with appellee made in

May 1905, that he should receive one-half of whatever of her father's property he might obtain for her and that the property so obtained amounted in value to about $3000.

Appellant testified to the oral contract, as did also his daughter. Appellee testified denying that she made the contract or any contract of that nature; there was other evidence in the case tending to corroborate each of the parties. It is doubtful whether the suggestions of the mutual friend induced the will in question, and it does not appear that appellant paid anything for whatever may have been done in that regard. The jury found for the defendant and judgment was entered on the verdict. We are asked to reverse and remand the case solely on the ground that the evidence does notsupport the verdict, no error of law is complained of. We are not inclined to disturd the judgment. The record does not present a case in which a reviewing court should set aside the verdict of a jury sanctioned by the trial judge; and in our opinion it is a case in which successive juries would almost certainly return the same verdict.

The judgment is affirmed.

by 1500, that he should receive one-half of whatever of her father's property he might obtain for her and that the property so obtained amounted in value to about $1000.

Appellant testified to the oral contract, as did also the daughter. Appellee testified denying that she made the contract or any contract of that nature; there was other evidence in the case tending to corroborate each of the parties. It is doubtful whether the suggestions of the natural friend induced the will in question, and it does not appear that appellant paid anything for whatever may have been done in that regard. The jury found for the defendant and judgment was entered on the verdict. We are asked to reverse and remand the case solely on the ground that the evidence does not support the verdict, no error of law is complained of. We are not inclined to disturb the judgment. The record does not present a case in which a reviewing court should set aside the verdict of a jury sanctioned by the trial judge; and in our opinion it is a case in which successive juries would almost certainly return the same verdict.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5838.

William Noonen, Appellee	)	
vs	)	Appeal from Whiteside.
Theodore Gebhardt, Appellant,	)	

Opinion by CARNES, J.

William Noonan, Appellee, hereinafter called plaintiff, sued Theodore Gebhardt, Appellant, hereinafter called defendant, in assumpsit for commissions on the sale of a farm, and had verdict and judgment for $2400.00 from which this appeal is prosecuted.

The defendant was the owner of a farm of 240 acres in Lee County, Ill. he listed it for sale with A. P. Porter, a real estate agent at Sterling, Ill. Porter interested the plaintiff who was engaged in bringing purchasers of farm lands from the central part of the state to the more northern counties, and the plaintiff, with Porter and two land seekers named Bree and Ludwig, drove to defendant's farm. It is claimed by plaintiff that while there the defendant agreed with him that he might, if he affected a sale, have anything received in excess of $135.00 an acre. The farm was soon afterwards sold to David J. Gilchrist, a purchaser produced by plaintiff, for $135.00 an acre. It is also claimed by plaintiff that the contract between himself and defendant was re-affirmed at the time

No. 5858.

William Noonan,
Appellee
vs
Theodore Gebhardt,
Appellant.

Appeal from Whiteside.

Opinion by DUFFIES, J.

William Noonan, Appellee, hereinafter called plaintiff, sued Theodore Gebhardt, Appellant, hereinafter called defendant, in assumpsit for commissions on the sale of a farm, and had verdict and judgment for $5400.00 from which this appeal is prosecuted.

The defendant was the owner of a farm of 240 acres in Lee County, Ill. He listed it for sale with A. P. Porter, a real estate agent at Sterling, Ill. Porter interested the plaintiff who was engaged in bringing purchasers of farm lands from the central part of the state to this more northern counties, and the plaintiff, with Porter and two land seekers named Ree and Ludwig, drove to defendant's farm. It is claimed by plaintiff that while there the defendant agreed with him that he might, if he effected a sale, have anything received in excess of $135.00 an acre. The farm was soon afterwards sold to David J. Gilchrist, a purchaser produced by plaintiff, for $135.00 an acre. It is also claimed by plaintiff that the contract between himself and defendant was re-affirmed at the time

of the negotiations with Gilchrist. Defendant denies that he made such an agreement, or any agreement whatever for commissions with plaintiff, and the case turns on that question of fact.

Coundel for appellant say the proof of the contract rests on the unsupported testimony of the plaintiff as a witness, and that he is impeached by other credible testimony, and he callsattention to various contradictions in the testimony of plaintiff and Bree, Ludwig and Gilchrist as to what was said and what occurred in conversations between them, but not more than is often found in the narrations of honest, intelligent peopel of conversations and events related after quite a lapse of time, as in this casewhere the testimony was given more than a year after the occurrance. These contradictions statements relate to times and places when and where certain statements were made, the language used, etc., and are such as to indicate not untruthfylness, but a lack of memory of details surrounding an important statement or transaction. Plaintiff was corroborated by two witnesses, Porter and one Thompson, but counsel say there is no probative force in their testimony because in details they disagree; yet there seems to be little if any more than the usual discrepancy of statements among honest people who have not been carefully over the matter together in an attempt to reconcile their conflicting recollections.

of the negotiations with Gilchrist. Defendant denies that he made such an agreement, or any agreement whatever for commissions with plaintiff, and the case turns on that question of fact.

Counsel for appellant say the proof of the contract rests on the unsupported testimony of the plaintiff as a witness, and that he is impeached by other credible testimony, and he calls attention to various contradictions in the testimony of plaintiff and Bree, Madeig and Gilchrist as to what was said and what occurred in conversations between them, but not more than is often found in the narrations of honest, intelligent people of conversations and events related after quite a lapse of time, as in this case where the testimony was given more than a year after the occurrence. These contradictory statements relate to times and places when and where certain statements were made, the language used, etc., and are such as to indicate not untruthfulness, but a lack of memory of details surrounding an important statement or transaction. Plaintiff was corroborated by two witnesses, Porter and one Thompson, but counsel say there is no probative force in their testimony because in details they disagree; yet there seems to be little if any more than the usual discrepancy of statements among honest people who have not been carefully over the matter together in an attempt to reconcile their conflicting recollections.

The theory of plaintiff's case is that the defendant had placed the farm in Porter's hands for sale at $125.00 an acre and Porter was to receive a commission of $1.00 an acre; this is testified to by Porter and denied as to the selling price by defendant. Defendant was asked on cross examination if he had not placed the farm with other agents named for sale at $125.00 an acre, and was compelled to answer over the objection of his attorney. He denied that he had done so. These other agents were called as witnesses in rebuttal by plaintiff and testified that the defendant did so place the farm with them. This is urged by appellant as reversible error. We are of the opinion that the evidence was incompetent, but it was not objected to and therefore appellant cannot here complain of that. It was not harmful error to require the defendant to answer whether he did so offer his farm for he denied that he did so, and counsel could not permit the other witnesses to testify without objection and take the benefit of their evidence if they corroborated the defendant, or assign error on it if they did not.

There was ample evidence introduced by the plaintiff to support the verdict.

The defendant as a witness flatly denied every statement on which his liability to the plaintiff could be based. He was contradicted by other witnesses in the case as well as by the plaintiff, and the contradictions were of a character not to be readily excused

on the ground of a lack of memory. It was for the jury and trial judge to pass on the credibility of the witnesses, and this record presents a strong illustration of the wisdom of the rule requiring them, with their superior opportunities for judging, to do so, and forbidding a reversal by the reviewing court unless the verdict is manifestly against the weight of the evidence. The plaintiff was not a resident of the county where the case was tried and his claim was not one that a jury would be likely to regard with under favor. There is no reason to doubt that their verdict was based on an honest consideration of the evidence, and it should not be disturbed in the absence of material error of law.

It is argued that the Court erred in permitting a witness to testify that a fact of which he spoke was fixed in his mind by his making a written memoranda of it shortly after it occurred. The memoranda was not offered in evidence and we see no prejudicial error in that evidence. Complaint is made of an instruction that is said to fail to direct the jury that their belief must be based on the evidence. Graff v. The People, 134 Ill. 380 and Langdon v. The People, 133 Ill. 388 are cited as illustrations of the law that the jury must base their belief on the evidence and that such requirement must not be ignored in the instruction. But the instruction complained of falls within the rule announced in Village of Altmont v. Carter, 196 Ill. 286 where it id said, "A requirement in the first part of an instruc-

on the ground of a lack of memory. It was for the jury and trial judge to pass on the credibility of the witnesses, and this record presents a strong illustration of the wisdom of the rule requiring them, with their superior opportunities for judging, to do so, and forbidding a reversal by the reviewing court unless the verdict is manifestly against the weight of the evidence. The plaintiff was not a resident of the county where the case was tried and his claim was not one that a jury would be likely to regard with under favor. There is no reason to doubt that their verdict was based on an honest appreciation of the evidence, and it should not be disturbed in the absence of material error of law.

It is argued that the Court erred in permitting a witness to testify that a fact of which he spoke was fixed in his mind by his making a written memorandum of it shortly after it occurred. The memorandum was not offered in evidence and we see no prejudicial error in that evidence. Complaint is made of an instruction that is said to fail to direct the jury that their belief must be based on the evidence. Gurff v. The People, 154 Ill. 634 and Langdon v. The People, 133 Ill. 888 are cited as illustrations of the law that the jury must base their belief on the evidence and that such requirement must not be ignored in the instruction. But the instruction complained of falls within the rule announced in Village of Altmont v. Carter, 188 Ill. 486 where it is said, "A requirement in the first part of an instruc-

tion that the jury must base their findings upon the evidence applies and extends to all subsequent clauses in the instruction, and it is unnecessary in each of the succeeding sections to inform the jury that they must find from a preponderance of the evidence."

Complaint is made of the action of the Court in giving and refusing other instructions, but we fail to find any prejuducual error in that respect. As we read the record the defendant had a fair trial before a jury fairly instructed on the law, and we find no reason for reversing the judgment ofthe Court approving their verdict. The judgment is affirmed.

Affirmed.

tion that the jury must base their findings upon the evidence applies and extends to all subsequent clauses in the instruction, and it is unnecessary in each of the succeeding sections to inform the jury that they must find from a preponderance of the evidence."

Complaint is made of the action of the Court in giving and refusing other instructions, but we fail to find any prejudicial error in that respect. As we read the record the defendant had a fair trial before a jury fairly instructed on the law, and we find no reason for reversing the judgment of the Court approving their verdict. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 2853.

C. V. O'Connor,
Appellee,
vs.
P. R. Kennedy,
Appellant,

Appeal from Boone.

186 I.A. 277

Opinion by CARNES, J.

Appellant, P. R. Kennedy, sold a farm in Boone County, Ill., to one Schwebke. Appellee, C. V. O'Conner, had some connection with negotiations between Kennedy and Schwebke prior to the sale and demanded of Kennedy a commission, claiming that he secured the purchaser and that Kennedy had promised him a commission if he would secure a purchaser. This action was brought on that claim and resulted in a verdict and judgment for appellee of $608.54, from which this appeal is prosecuted.

Appellee is not a real estate agent, but is engaged in other business at the City of Belvidere in said County. While this fact does not affect his rights to recover a commission for the sale of the farm, if he at the instance of appellant procured the purchaser, still his connection with the transaction, and what the parties understood and had a right to understand from various things said and done, should be considered in the light of the fact that he was an acquaintance or friend of Kennedy and was not engaged in selling faem lands as a business.

Mr. Justice.

E. T. O'Connor,
Lopelise,
vs.
T. E. Kennedy,
Appellant.

Appeal from Bonne.

1861A.277

Opinion of Justice.

Appellant, T. E. Kennedy, sold a farm in Bonne County, Ill., to one Lopelise. Appellee, T. T. O'Connor, had some connection with negotiations between Kennedy and Lopelise prior to the sale and received if yearly a commission, claiming that he secured the purchaser and that Kennedy had promised him a commission if he would secure a purchaser. This action was brought on that claim and resulted in a verdict and judgment for appellee of $200.00, from which this appeal is prosecuted.

Appellee is not a real estate agent, but is engaged in other business at the City of Bellvieve in said County. While this fact does not affect his rights in earning a commission for the sale of the farm, if he was the inducing of appellant procured the purchaser, with the intention with the transaction, and that the parties contracted and had a right to understand from various things said and done, should be considered in the light of the fact that he is an acquaintance or friend of Kennedy and is not engaged in selling farm lands as a business.

The evidence is so conflicting that the verdict should only be accepted as controlling in the absence of material error of law.

Appellee, over objections of appellant, introduced evidence of attempts by appellant to sell the farm through other agents and of prices named by him and commissions offered. And it so appeared that the sale in question was a good one and more advantageous to appellant than would have been a sale under him former proposals. The jury in this way was informed of facts not pertinent to the issue that probably influenced their verdict. Appellee defends the introduction of this evidence on the ground that appellant's counsel in his opening statement to the jury made assertions that furnished the ground for introduction of this testimony, as explaining or supplementing the statement so made; also that appellant as a witness mentioned the fact that he had employed other agents to sell the land. We do not think the grounds sufficient to warrant the evidence introduced, but as the provocation for that line of testimony will probably not be offered on another trial, we need not go further into detail on that question.

The Court at the instance of appellee instructed the jury, "That the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side, does not necessarily, alone determine that the preponderance of the evidence is on

The evidence is so conflicting that the verdict should only be brought in controlling in the absence of material error of law.

Appellee, over objections of appellant, introduced evidence of attempts by appellant to sell the land through other agents and of prices named by him and transactions offered. Did it so appear that the sale in question was a good one and more advantageous to appellant than would have been a sale under the power contracts, the jury in this may was informed of facts and circumstances by the lower court properly influenced their verdict. Appellee defends the introduction of this evidence on the ground that appellant's counsel in his opening statement to the jury made assertions that brought the ground for introduction of this testimony, in explaining or qualifying the statement so made. Also that appellant as a witness mentioned the fact that he had received other offers to sell the land. So he was also on ground sufficient by stating the evidence introduced, but on the proposition for that fact, or testimony will probably not be offered, in rebuttal thereof, it should further into detail in that question.

The Court at the instance of appellee instructed the jury, "That in fact the number of witnesses testifying on one side is larger than the number testifying on the other side, does not necessarily, alone determine that the preponderance of the evidence is in

the side for which the larger number testified. In order to determine that question, the jury must be influenced by and take into consideration the appearance and conduct of the witnesses while testifying; their apparent intelligence, or lack of it; their opportunity of knowing or seeing the fact, or subject concerning which they have testified, or the absence of such opportunity; their interest or absence of interest in the result of the case, and from all these facts as shown by the evidence, the jury must decide upon which side is the preponderance ".

By this instruction the jury were told that the law required them to consider the appearance of the witnesses, their apparent intelligence, their means of knowledge and their interest or want of interest in the result of the case and from these four things excluding questions of the number of witnesses, the reasonableness of their statements, their corroboration by other evidence and other considerations that properly induce a belief or disbelief of the statements of our fellow man, determine the matter of preponderance. It is difficult to see why it was ever presumed necessary or proper to enumerate to a jury the points that they must, as a matter of law, consider in determining the credibility of a witness. If they believe or disbelieve, as jurors, guided by their knowledge and experience as men, they will give or withhold confidence for various reasons that they might

the rule for which the Larmer number [illegible]. In order to determine that question, the jury must be informed by and take into consideration the appearance and conduct of the witnesses while testifying; their apparent intelligence, or lack of it; their opportunity of hearing or seeing the fact, or subject concerning which they have testified, or the absence of such opportunity; their interest or absence of interest in the result of the case, and from all these facts as shown by the evidence, the jury must decide which side is the preponderance ".

In this instruction the jury were told it was the law required them to consider the appearance of the witnesses, their apparent intelligence, their means of knowledge and their interest, or want of interest in the result of the case and from these four things evidently questions of the number of witnesses, the reasonableness of their testimony, their corroboration by other evidence, and other circumstances that properly induce a belief or disbelief of the statements of our fellow men, determine the matter of preponderance. It is difficult to see why it was ever deemed necessary or proper or necessary to a jury the points this Court held, in a [illegible] consider in determining the credibility of a witness. If they believe or disbelieve, in [illegible] their knowledge and experience in [illegible], they will give a reasonableness for [illegible] that they might

be able to state but would hesitate to say that they were influenced only by matters that could be clearly defined . Our Supreme Court long ago said, "A Court can hardly err in refusing to give any instruction which seems designed to influence a jury as to the credit to be given to particular witnesses." Martin v. People 54 Ill. 225, and repeated the statement in Godar v. Ham Nat. Bank 225 Ill. 572?.

The instruction here complained of would not if construed as excluding the question of the number of witnesses be held reversible error under the authority of E. J. & E. Ry. Co. v. Lawler, 229 Ill. 621 and the cases there reviewed and the numerous subsequent cases in which that case is cited and discussed, because the greater number of witnesses cannot be said to have testified for appellee on any controverted fact, but in that case while points to be considered were enumerated in an instruction, the jury were told they should consider them " In view of all the other evidence, facts and circumstances proved in the trial, and from all the evidence, facts and circumstances in evidence determine on which side is the weight or preponderance of the evidence." Thus only improperly excluding the factor of number of witnesses . The instruction in our case is bad and substantial error under the rule announced in Chicago Union Trac. Co. v. Hampe, 228 Ill. 346, where the Court said , "It is proper to enumerate elements which they (the jury)

be able to state but could hardly believe they were influenced only by matters that could be clearly defined. Our Supreme Court long ago said, "A Court can hardly err in refusing to give any instruction which seems designed to influence a jury as to the credit to be given to particular witnesses." Martin v. People 84 Ill. 625, and repeated the statement in Colar v. Nat. Bank 88 Ill. 1171.

The instruction here complained of could not if construed grounding the question of the number of witnesses be held reversible error under the authority of I. C. & N. Tr. Co. v. Lawler, 889 Ill. 601 and the cases there reviewed and the numerous subsequent cases in which that case is cited and discussed, because the greater number of witnesses cannot be said to have testified for negligence in any controverted fact, but in that case which relates to be considered were enumerated in an instruction, the jury were told they should consider them " In view of all the other evidence, there sufficiencies proved in the trial, and from all the evidence, facts and circumstances in evidence determine in which side is the weight or preponderance of the evidence." This only improperly emphasizing the factor of number of witnesses. The instruction in our case is had and substantial error under the rule announced in Chicago Union Trac. Co. v. Hampe, 288 Ill. 360, where the Court said, "It is proper to enumerate elements which may (the jury)

may consider, but they should always be left free to consider all the evidence introduced and all the facts and circumstances shown upon the trial, in determining the crucial question as to where lies the greater weight of the proof". While it is true that instructions of this character have the sanction of law if accurately worded and are not in every case held reversible error even if inaccurate and subject to criticism, and the instruction is somewhat helped by another given for appellee still from the reading of this record we conclude because of the errors here pointed out the case should be submitted to another jury.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5854.

Bertha Martukis, &c. appellee

vs Appeal from Winnebago.

Ferdinand P. Keyt, appellant.

Carnes, J.

Appellee Bertha Martukis a girl sixteen years old alighted from a street car in the city of Rockford and in endeavoring to cross the street she was struck and injured by a taxi-cab owned by appellant. She broughtthis suit to recover damages for such injury and had verdict and judgment. The evidence is very conflicting as to where she was when struck, whether she was mindful of surrounding conditions or had her attention on other matters; also as to the rate of speed of the taxi-cab and the effort made by the driver to give warning and avoid danger. The record leads quite as strongly to the conclusion that the accident was caused by the carelessness of appellee or the combined carelessness of herself and the driver of the car, as it does to the conclusion that she was in the exercise of ordinary care and the driver was guilty of negligence causing the injury. In the absence of error of law we might feel compelled to treat the verdict of the jury as controlling, but we are not inclined to do so if there was materialerror of law.

The 9th. instruction asked by appellee and given, read: "The Court instructs the jury as a matter of law that if you believe from the evidence that any of the witnesses have wilfully testified falsely to any material fact in evidence then you willbe entitled to entirely disregard any of the evidence of this witness in so far as his testimony is not corroborated by other competent evidence." This instruction is bad under the authority of Weston v Teufel 213 Ill.

391, where the court said "The jury are not the judges of whether evidence is or is not competent. The instruction erroneously uses the word 'competent' instead of the word 'credible' or other work of like import. Evidence introduced may be competent and not credible." Instructions of this character are of doubtful propriety; a court can hardly err in refusing them; Martin v People 54 Ill. 335, Godair v Ham. Nat. Bank 235 Ill. 572, when accurately worded they have the sanction of the law and trial courts often feel compelled to give themiif asked, but there are many expressions in opinions of the supreme and appellate courts that should warn counsel of the danger of asking these cautionary instructions not accurately worded.

The judgment is reversed and the cause remanded.

**

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5858

Annie Jopp, et al, appellees

vs Appeal from Lake.

R. H. Fairburn et al appellants.

186 I.A. 280

Carnes, J.

Barthomic Jopp died as the result of an accident October 11, 1907. His widow and children, appellees, brought this action under Section 9 of the Dram-Shop Act against R. H. Fairburn a saloon keeper, and the appellant Furtune Bros. Brewing Co. alleged to be the owner of the building in which the saloon was kept. The case was here on a former appeal and our opinion is reported in 157 Ill. App. 609. On retrial there was a verdict and judgment against both defendants for $1300 and the Brewing Company only appeals.

Appellant's statement and argument is confined to two pages of reading matter; there is no attempt to state the pleadings or the facts. It is in substance asserted that there is no proof that appellant owned the building at the time in question, or that it knew intoxicating liquors were sold there; that a saloon may be a place where soft drinks are sold, and beer does not necessarily mean lager beer.

It appears from the abstract that the president of appellant stated that Fairburn conducted a saloon on said premises from the time it, appellant, purchased the building in 1901 until the district became a dry zone in 1908, and sold quantities of beer for appellant. There is other evidence that lager beer was sold there. It is not suggested that the proof does not sustain the averments in the declaration that deceased purchased intoxicating liquors there, that caused his intoxication and death. There is other evidence as to payment of licence and mortgage of saloon fixtures, tending to

Sup. No. 3858

Annie Jory, et al, appellees

vs

Appeal from Lake.

H. H. Fairburn et al appellants.

Barrett, J.

Burthonia Jory died as the result of an accident October 11, 1907. She either had children, appellees, because this action under Section 4 of the Dram-Shop Act against H. Fairburn a saloon keeper, and the appellant Turning Brook Brewing Co. alleged to be the owner of the building in which the saloon was kept. The case was tried on a trained and our opinion is reported in 187 Ill. App. 370. In regard there was a verdict and judgment against both defendants for $1500 and the Brewing Company only appeals.

Appellant's statement and argument is confined to the paper of pleading matter; there is no attempt to state the pleadings or the facts. It is in substance asserted that there is no proof that appellant owned the building in question, or that it knew intoxicating liquors were sold there; that a saloon may be a place where such liquors are sold, and that one does not necessarily [illegible] them.

It appears from the abstract that [illegible] appellant called Jim Fairburn as a witness [illegible] appellees from the time it, apparently, [illegible] in 1902 until the fatal house [illegible] in 1907, he had quantities of beer for sale. There is [illegible] evidence that liquor was sold there. It is not [illegible] that the witnesses do not mention the [illegible] in the [illegible] purchased intoxicating liquor [illegible] the intoxication and death. [illegible] witnesses of licenses and evidence of [illegible] known, [illegible]

show that the place was a dram shop and the building owned by appellant and leased for dram-shop purposes. The jury were fully warranted in so finding from the evidence.

We find no substantial error in the record., therefore the judgment is affirmed.

Whitney P. J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5866.

Amie I. Adams, appellant.

vs. Appeal from Lake.

John Gordon, appellee

186 I.A. 286

Carnes, J.

Appellee, John Gordon, owned a tract of land in Lake County, Illinois, and entered into a contract with one Tracy to sell him a part of it, in which contract it was provided that Tracy should have the right to use a well and its appurtenances and a path not exceeding 3 feet in width, leading to the well located on that part of the tract not sold, under certain conditions specified, until such time as public water should be laid and installed in an adjoining public street or highway. Afterwards appellee conveyed the land so contracted, to Tracy and he conveyed it to Amie I. Adams the appellant by an ordinary warranty deed with no recital of easements or appurtenances. Afterwards appellee denied appellant the use of the well and barricaded said pathway. Appellant filed a bill in chancery praying for an injunction restraining appellee from interfering with her use of the path and well claiming an easement therein. The court sustained an demurrer to an amended bill and appellant standing by said amended bill it was ordered dismissed for want of equity, and she prosecutes this appeal. The question is whether appellant has in her bill set up facts entitling her to an easement in the well and pathway for that indefinite time that may elapse before public water is furnished in said street or highway, which may be forever or may be during the life of appellant. In either event the interest that she is contending for is a freehold. 16 Cyc 614. "A perpetual easement inlands, or any interest in lands

in the nature of such easement, when credited by grant, or by any proceeding which is in law equivalent to a grant, constitutes a freehold. A legal interest in lands is to be deemed a freehold, not because of the kind or quantity of the interest, but by reason of its sufficient legal indefinite duration. An easement for life or in fee is a freehold." Chaplin v Commissioners of Highways 126 Ill. 264; See also Foote v Marggraf, 233 Ill. 48; Haigh v Lenfesty 141 Ill. App. 409; Craig v Craig, 154 Ill. App. 1. As the case involves a freehold the appeal should have been taken to the Supreme Court. The clerk is therefore directed to transfer the record and files and the order of this court to the Supreme Court.

Transferred to the Supreme Court.

Whitney, P. J. took no part.

**

In the nature of such assurance, then credited by trust, or by any proceeding which is in law equivalent to a grant, conveyance or freehold. A legal interest is lands is to be deemed a freehold, not because of the kind or quantity of the interest, but by reason of the sufficient legal indefinite duration. As assessment for life or on the life is freehold. Chaplin v Commissioners of Highways 108 Ill. 304; Ex. Inv Ports v Hayward, 288 Ill. 19; Haigh v Kaufmann 143 Ill. 228; Cook v Cook, 188 Ill. 8-9. I. As the case involves a freehold the appeal should have been taken to the Supreme Court. The clerk is therefore directed to transfer the record and files and the order of this court to the Supreme Court.

Transferred to the Supreme Court.

Whitney, P. J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5873.

Erneste Wulfe, appellee

vs Appeal from Kankakee.

American Packing and

Provision Company, appellant.

186 I.A. 292

Carnes, J.

Appellant, American Packing and Provision Co., was having some cattle driven along a public highway to its packinghouse at Kankakee. When near their destination a cow lay down and on being made to get up went but a short distance and lay down again, it was then left tied for an hour or two while the rest of the cattle were driven on to their destination. A man and woman were employed by appellant to go out and bring her in. Appellee Erneste Wulfe, a middle aged woman had been working on a piece of land in the neighborhood and was walking home in the highway and passed the employees of appellant and the cow, she says she gave some advice about getting the cow to go along, and appellants witnesses say she tried to assist and hit the cow with her hoe; at any rate she passed on ahead of the cow and when she had gone fifty or one hundred feet the cow got up and ran down the road and against her and knocked her down, to some extent bruising and injuring her. She brought this suit to recover for that injury and alleged in different counts of her declaration that appellants servants negligently struck and over drove the cow and caused her to become overheated and attack the plaintiff; that appellant negligently over drove and overheated the animal and struck and abused her until she became overheated andangry; that appellant was driving the cow and she was vicious and inclined to attack persons and that appellant knew it and failed

to provide sufficient persons to manage the cow; that appellant was driving cattle on the street and that its servants were incompetent. There was verdict and judgment for $800 for appellee from which this appeal is prosecuted and reversal sought on the ground of negligence on the part of appellee; no negligence on the part of appellant and that the damages are highly excessive.

There is no evidence that the cow was naturally vicious or that appellant had any reason to suspect or believe that she was vicious. Appellees theory is that she was overheated in driving and improperly beaten and goaded until she became frantic, and attacked appellee. The evidence does not support that theory. It is quite clear that it was an ordinary case of driving cattle along the public highway, this cow lay down either because she was overheated or foot sore, appellants servants took the usual and ordinary means to get her up and drive her along the road; appellee, the cow, and appellants servants were all rightfully in the highway, the cow unexpectedly either attacked or run against appellee. We see nothing to distinguish the case from others where a domestic animal with no known vicious tendencies attacks and injures a person. We do not think the jury could reasonably find that because this animal was footsore or overheated and lay down beside the road, that it was evidence of a vicious tendency or any notice to appellant that she wasliable to attack or injure a person, and we see no evidence in the record that the injury was attributable to any negligence of appellant. It is said appellee was negligent in not watching the cow and guarding against injury. We do not assent to that. We are of opinion that ordinarily prudent people in the position of either appellee or appellants servants, would not have anticipated any danger.

to provide sufficient warning to manage the cow; that appellant was driving cattle on the street and that its servants were incompetent. There was verdict and judgment for $800 for appellee from which this appeal is prosecuted and reversal sought on the ground of negligence on the part of appellee; no negligence on the part of appellant and that the damages are highly excessive.

There is no evidence that the cow was naturally vicious or that appellant had any reason to suspect or believe that she was vicious. Appellee's theory is that she was overheated in driving and improperly beaten and goaded until she became frantic, and attacked appellee. The evidence does not support that theory. It is quite clear that it was an ordinary case of driving cattle along the public highway, that cow lay down either because she was exhausted or footsore, appellants servants took the usual and ordinary means to get her up and drive her along the road; appellee, the cow, and appellants servants were all lightly in the highway, the cow unexpectedly rushed attacked or run against appellee. We see nothing to distinguish the case from other where a domestic animal with no known vicious tendencies attacks and injures a person. We do not think the jury could reasonably find that because this animal was footsore or overheated and lay down beside the road, that it was guilty of a wrongful tendency or any reason to appellant that she was liable to attack or injure a person, and we see no evidence in the record that the injury was attributable to any negligence of appellant. It is said appellee was negligent in not watching the cow and guarding against injury. We do not assent to that. We are of opinion that ordinarily prudent people in the position of either appellee or appellants servants, would not have anticipated any danger.

It is familiar law that the owner of a domestic animal of a species not inclined to mischief is not liable for injury committed by it to the person of another in the absence of notice to the owner of mischievous tendencies of the animal. Dommy Hollenbeck, 259 Ill. 383 is a late case announcing that law. We do not think a judgment for appellee can be sustained by the facts of this case without ignoring that law. We presume another trial would not show the facts materially different from those disclosed by this record; therefore we reverse the judgment without remanding the case.

The judgment is reversed.

Finding of facts.

We find that the defendant was not guilty of any negligence which caused or contributed to the injury for which plaintiff sues.

***

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5874.

Julia E. Wood, Administratrix of the Estate of Willoam Wood, Appellee, vs James E. McEvoy and Julia Wood Mc Evoy, Appellants.	Appeal from La Salle.

186 I.A. 293

Opinion by CARNES. J.

This suit was begun in assumpsit by William Wood, against his sister Julia Wood McEvoy and her husband James E. McEvoy, the appellants, to recover $1350 received by appellants as purchase price for a twenty acre tract and an undivided half interest in another twenty acre tract of land conveyed by them to one Hansel, which lands he claimed to own. After a partial trial before a jury the case was transferred to the chancery side, bill and answer filed, and proofs heard by the chancellor, resulting in a decree against appellants for the whole amount with interest, less a counter claim about which there is no dispute. The chancery record only is filed here, the question presented is whether or not William Wood was the equitable owner of the land so sold.

James Wood, the father of William and Julia Wood, died at the home of his daughter Julia October 21, 1902, aged eighty-two years. He had been living there about

No. 1874.

Julia E. Wood, Administratrix of the Estate of William Wood, Appellee, vs James T. McEvoy and Julia Wood McEvoy, Appellants.	Appeal from Du Bois.

186 I.A. 293

Opinion by GARNER C. J.

This suit was begun in assumpsit by William Wood, against his sister Julia Wood McEvoy and her husband James T. McEvoy, the appellants, to recover $1850 received by appellants as purchase price for a twenty acre tract and an undivided half interest in another twenty acre tract of land conveyed by them to one Warner, which land he claimed to own. After a partial trial before a jury the case was transferred to the chancery side, bill and answer filed, and proofs heard by the chancellor, resulting in a decree against appellants for the whole amount with interest, less a counter claim about which there is no dispute. The chancery record only is filed here. The question presented is whether or not William Wood was the equitable owner of the land in suit.

James Wood, the father of William and Julia Wood, died at the home of his daughter Julia October 21, 1908, aged eighty-two years. He had been living there about

four years, was in very infirm health and when he came there his business affairs were in bad condition. He gave a general power of attorney to his son-in-law James E. McEvoy, who took charge of his business, and his daughter Julia provided for his health and comfort during the rest of his life. There is no question made here about his mental capacity, but his physical condition was apparently such, during the four years he resided with appellants, that he could not and did not give much attention to his property.

The two twenty acre tracts in question were for the most part unimproved and unproductive, they were in the same quarter section but not adjoining, and were located in Grundy County, Illinois, near the home farm of James Wood. William Wood and one Gibbs, prior to 1878, had title to one of these tracts as tenants in common, and in 1878 James Wood got a deed to himself from Gibbs of his half interest in the tract, in consideration of the transfer to Gibbs of William's interest in a saloon business that he, William, owned, and a horse owned by James Wood. It is claimed by William, and there is evidence supporting his claim, that at the time his father owed him $300. The other twenty acre tract was conveyed to James Wood in 1884. William negotiated the purchase of the tract and directed the deed to be made to his father, he claimes he paid the purchase price himself with money obtained on a note signed by himself and one Coulihan, and there is

four years, was in very ill-health and when he came there his business affairs were in bad condition. He gave a general power of attorney to his son-in-law James T. McCoy, who took charge of his business, and his daughter Julia provided for his health and comfort during the rest of his life. There is no question made here about his mental capacity, but the physical condition was apparently weak, during the four years he resided with Gillespie, that he could not and did not give much attention to his property.

The two twenty acre tracts in question were for the most part unimproved and unproductive, they were in the same quarter section but not adjoining, and were located in Grundy County, Illinois, near the Nora farm of James Wood, William Wood and one Gibbs, prior to 1878, had title to one of these tracts as tenants in common, and in 1878 James Wood got a deed to himself from Gibbs of his half interest in the tract, in consideration of the transfer to Gibbs of William's interest in a saloon business that he, William, owned, and a horse owned by James Wood. It is claimed by William, and there is evidence supporting his claim, that at the time the father owed the debt. The other twenty acre tract was conveyed to James Wood in 1884, William negotiated the purchase of the tract and directed the deed to be made to his father, he claims he paid the purchase price himself with money obtained by a note signed by himself and one Gunthum, and there is

evidence to support that claim. At about the time of these conveyances one Reed occupied the forty acres as a tenant of William for five or six years, paying him rent and not knowing that James Wood claimed any interest in the land, though he lived near by at the time. While the record title to this forty actes was in James Wood, with the exception of the undivided half of one of the twenty acre tracts, it is admitted to have been understood in the family up to about the time James went to live with appellants, that the entire forty acres belonged to William, He was intemperate and improvident, the land of little rental value, and little attention seems to have been given it, except to keep the texes paid, during the lifetime of James Wood; both the twenty acre tracts were dealt with as a whole in renting and paying taxes. While McEvoy was acting as attorney in fact he contracted to sell the land and William claims that on discovering it he protested, with the result that the trade was abandoned and deeds that had been prepared were destroyed. There is a controversy about this matter, but there was, no doubt, a sale negotiated, deeds made and the trade not consummated.

About six months before the death of James Wood he conveyed his farm of 160 acres with some other tracts of land and the land in controversy here, to his daughter Julia with no mention of any adverse interest in this land and for the nominal consideration of One dollar. He

evidence to support that claim. It seems that this of these conveyances one had occupied the forty acres as a tenant of William for five or six years, paying his rent and not knowing that James Ross claimed any interest in the land, though he lived near by at the time. While the record title to this forty acres was in James Wood, with the exception of the undivided half of one of the twenty acre tracts, it is believed to have been understood in the family up to about the time James went to live with appellants, that the entire forty acres belonged to William. He was intemperate and improvident, the land of little rental value, and little attention seems to have been given it, except to keep the taxes paid, during the lifetime of James Wood; both the twenty acre tracts were dealt with as a whole in renting and paying taxes. While Harvey was acting as attorney in fact he contracted to sell the land and William claims that on discovering it is probated, with the result that the trial was abandoned and land that had been prepared was destroyed. This is a controversy about this matter, but there was, no doubt, a vale negotiated, deeds made and the trial not consummated.

About six months before the death of James Wood he conveyed his farm of 160 acres with some other tracts of land and the land in controversey here, to his daughter Julia with no mention of any adverse interests in this land and for the nominal consideration of One dollar. We

had two other children and it incidentally appears that the fact of these conveyances was not known to them or to William, and that the deeds were not recorded until after the death of the father, and then a suit was prosecuted by the other two children to set aside the conveyance of the lands other than the two tracts in controversy here, which suit appellants settled, but this land was not included in the controversy or settlement.

In March 1904, there was made, first; a contract with, then deeds to, one Wansel, of the entire forty acres. The contract was signed by William, Julia and her husband on the one part; there is a conflict of evidence as to the negotiations and the respective parts taken by William Wood and James McEvoy in the same, but no dispute that William conveyed the half interest in the twenty acres to which he held record title and received payment for ten acres, and appellants conveyed the balance and received payment for thirty acres, the $1350. for which this suit is brought.

There is ample evidence on the part of appellee, if believed by the Chancellor, to sustain the allegations of his bill that the land was at the time of purchase by James Wood paid for by William Wood and the title taken in his father's name to protect him against his own improvidence; declarations of James Wood to that effect are proven, and while there is also evidence that he told his daughter Julia, that William did not pay for the

had two other children and it incidentally appears that the last of these conveyances was not given to them or to William, and that the deeds were not recorded until after the death of the father, and then a suit was prosecuted by the other two children to set aside the conveyance of the lands other than the two tracts in controversy here, which suit appellants settled, but this land was not included in the controversy or settlement.

In March 1904, there was made, first, a contract with, then deeds to, one Russel, of the entire forty acres. The contract was signed by William, Doris and her husband on the one part; there is a conflict of evidence as to the negotiations and the respective parts taken by William Wood and James McEvoy in the same, but no dispute that William conveyed the half interest in the twenty acres to which he held record title and received payment for the same, and appellants conveyed the balance and received payment for thirty acres, the $1500, for which this suit is brought.

There is ample evidence on the part of appellee, if believed by the Chancellor, to sustain the allegations of his bill that the land was at the time of purchase by James Wood paid for by William Wood and the title taken in his father's name to protect his property in case of improvidence; declarations of James Wood to that effect are proven, and while there is also evidence that he said his daughter Julia, that William did not pay for the

land, that statement being a declaration in his own favor is not competent evidence. There was much business dealing between appellee and his father from time to time and it is quite probable that on an accounting at the time of the death of James, William would have been found to owe the estate; but however that may be if William in fact paid for this land at the time of its purchase and the title was taken in his fathers name for purposes of convenience he is entitled to the decree rendered; there is no claim that James held the title as security for the payment of money owing him by William, The uncontroverted fact that the family of children, for so many years, understood this forty acres belonged to William, leads strongly to the conclusion that it was so understood and treated by the father. The condition of the record title was discovered by James E. McEvoy about the time he was appointed attorney in fact for James Wood.

There is evidence that tends strongly to discredit the testimony of William Wood and some of his witnesses. There was a divorce case pending against William Wood in 1884 and 1885, in which the question of the ownership of this land was involved, and pleadings and affidavits were filed by William inconsistent with his claim here; and there is evidence tending to show that his father did not own him $300 or any other sum when the first purchase was made, and that William did not hire the money that he claims to have hired and used

in the second purchase. Many of the witnesses were not clear in their statements, some of them were testifying perhaps influenced by interest and prejudice. It is peculiarly a case in which weight should be given to the consideration that the Chancellor saw the witnesses and heard them testify, but aside from that consideration the evidence as presented in the record leads us to the conclusion reached by the Chancellor.

The decree is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5881

944

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 294

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5881.

Hannah Berg, Administratrix of the Estate of John W. F. Berg, Deceased. Appellee vs Lake Erie & Western Railroad Company and Peoria & Pekin Union Railway Company, Appellants.	Appeal from Peoria.

Opinion by CARNES, J.

This si an action for causing death by wrongful act, neglect or default, resulting on a second jury trial in verdict and judgment of $2500 against both appellants. The facts are that John W. F. Berg, appellee's intestate, was on the 8th day of March 1911, at eleven o'clock in the forenoon, in the employ of Peoria & Pekin Union Railway Company, one of the appellants, as a section man in its yards where he had been working for several years. His duty was to clean up and do various things about the yards. At the time in question he was tightening bolts on a track. He was sixty-six years old, in good health with good sight and hearing, the day was clear and bright. Whi le so employed he was killed by falling between the first and second coaches of a passenger train of the other appellant, Lake Reie & Western Railroad Company, a lessee of the Peoria &

No. 6221.

Hannah Berg, Administratrix of the Estate of John W. F. Berg, Deceased. Appellee	
vs	Appeal from Peoria.
Lake Erie & Western Railroad Company and Peoria & Pekin Union Railway Company, Appellants.	

O p i n i o n b y G A R N E R, J.

This is an action for causing death by wrongful act, neglect or default, resulting in a second jury trial in verdict and judgment of $8000 against both appellants. The facts are that John W. F. Berg, appellee's intestate, was on the 8th day of March 1911, at eleven o'clock in the forenoon, in the employ of Peoria & Pekin Union Railway Company, one of the appellants, as a switchman in its yards where he had been working for several years. His duty was to clean up and do various things about the yards. At the time in question he was tightening bolts on a truck. He was sixty-six years old, in good health with good sight and hearing. The day was clear and bright. He is supposed to have fallen or falling between the first and second sections of a passenger train of the other appellant, Lake Erie & Western Railroad Company, a lessee of the Peoria &

Pekin Company. He stepped from the track where he working to make way for an engine of the Vandalia Railroad Company that was appeoaching in one direction, and either while this engine was passing him, or just after it passed, he came into contact with the Lake Erie coaches going in the other direction. There was a space of about eight feet between the tracks and about four feet between trains if standing at the same time on these two tracks. A servant of appellant, Peoria & Pekin Company, wasin control of the movement of these trains and it is claimed that he was negligent and careless in ordering the Vandalia engine to come past and near deceased on one side and at the same time ordering the Lake Erie train to come past and near him on the other side.

The evidence for the most part is that the Vandalia engine had passed before the other train was opposite deceased, but appellee assumes it had not and that appellant Peoria & Pekin Company owed deceased a duty not to order two trains to pass in opposite directions on tracks at or near which he might be working. It is also argued that something ~~might~~ must have happened to cause deceased to fall between the cars, and that it may have been that the Vandalia engine squirted steam upon him and caused him to jump backwards, and while there were two eye witnesses to the accident that testified in the case and no proof to that effect except the inference that something ~~might~~ must have happened, that the jury were warranted in assuming

Pahin Company. He stepped from the train where he was waiting to make way for an engine of the Vandalia Railroad Company that was approaching in the direction, and either while this engine was passing him, or just after it passed, he came into contact with the Lake Erie engine going in the other direction. There was a space of about eight feet between the tracks and about four feet between trains if standing at the same time on these two tracks.

A servant of appellant, Peoria & Pekin Company, was control movement of these trains and it is claimed that he was negligent and careless in ordering the Vandalia engine to come past and then decreased on one side and at the same time ordering the Lake Erie train to come past and meet him on the other side.

The evidence for the most part is that the Vandalia engine had passed before the other train was opposite deceased, but appellee assumes it had not and that appellant Peoria & Pekin Company owed deceased a duty not to order two trains to pass in opposite directions on tracks at or near which he might be working. It is also argued that negligence [illegible] proximate cause [illegible] between the cars, and that it may have been that the Vandalia engine emitted steam upon him and caused him to jump backwards, and while there were two eye witnesses on the accident that testified in the case and no proof to that effect except the inference that something [illegible] happened, that the jury were warranted in assuming

it, because appellants did not produce the engineer in charge of the Vandalia engine at the time and show by him that it did not occur. Or it is said there may have been chunks of ice and coal on the ground over which deceased might have stumbled, and there was some evidence of chunks of coal and ice scattered around the yards. The argument is, that considering the experience and ability of deceased, something must have happened to cause the accident and that the jury were justified in finding that this assumed something was not the carelessness of deceased, but was some negligent act of appellants.

An ordinance of the city limiting the speed of passenger trains to ten miles an hour was plead, with the allegation that the Lake Erie train was exceeding that limit at the time of the injury. The fireman on the engine of the Vandalia train, called as a witness by appellee, testified that in his judgment the Lake Erie train was running about fifteen miles an hour, but on cross examination said he was facing the engine and could not well determine its speed, and would not say it was running more than six miles an hour; several other witnesses testifying on that question each placed the speed at less than ten miles an hour. The evidence does not sustain a finding that the speed ordinance was violated and at most can only be said to in some degree tend to prove that charge, perhaps sufficiently to compel a submission of the question, if it was controlling, to

it, because appellants did not produce the engineer in charge of the Vandalia engine at the time and show by him that it did not occur. Or it is said there may have been chunks of ice and coal on the ground over which deceased might have stumbled, and there was some evidence of chunks of coal and ice scattered around the yards. The argument is, that considering the superiority and ability of deceased, something must have happened to cause the accident and that the jury were justified in finding that this seemed something was not the ordinary case of deceased, but was some negligent act of appellants.

An ordinance of the city limiting the speed of passenger trains to ten miles an hour was placed, with the allegation that the Lake Erie train was exceeding that limit at the time of the injury. The fireman on the engine of the Vandalia train, called as a witness by appellee, testified that in his judgment the Lake Erie train was running about fifteen miles an hour, but on cross examination said he was judging the engine and could not well determine its speed, and could not say it was running more than six miles an hour. Several other witnesses testifying on that question said they thought the speed at less than ten miles an hour. The evidence does not warrant a finding that the speed ordinance was violated and at most can only be said to be some tendency tend to prove that fact, perhaps sufficiently to compel a submission of the question, if it be a controlling, to

the jury by the trial court, who is not permitted to weigh the evidence on a motion to direct a verdict.

Several questions are argued by appellants, and cross errors challenging the action of the court in giving and refusing instructions are assigned and argued by appellee. But if the facts do not make a case of actionable negligence it is unnecessary to consider other questions. It is clear that appellants at the time in question were proceeding on the theory that deceased would look out for his own safety and keep out of the way of moving trains and engines, that there was opportunity for him to do so, and that the accident was not one to be anticipated if he did exercise ordinary care in that respect, and cannot be accounted for except on the ground of inattention of deceased or some wanton act like squirting steam upon him, or some accident like his stumbling over a temporary obstacle in his way. There is no charge of wilful and wanton negligence and no suggestion of any except that the Vandalia engine may have squirted steam on deceased, which we have said is not supported by the evidence, and we need not stop to consider what effect the wilful act of an agent of the Vandalia Company, not a party to this suit, might have if proven. There is some ground for the assumption that deceased may have stumbled on a chunk of coal or ice in his way and thus fell between the cars; but while it is true that the master is bound to make the place where his servant works reasonably safe and is liable if dangerous obstructions are

the jury by the trial court, who is not permitted to weigh the evidence on a motion to direct a verdict.

Several questions are raised by appellants, and cross appeals challenging the action of the court in giving and refusing instructions are assigned and argued by appellee. But if the facts do not make a case of actionable negligence it is unnecessary to consider other questions. It is clear that appellants at the time in question were proceeding on the theory that General would look out for his own safety and keep out of the way of moving trains and engines, that there was opportunity for him to do so, and that the accident was not due to the unusual and if he did exercise ordinary care in that respect, and cannot be accounted for except on the ground of inattention of General or some reason not like equipping steam upon him, or unexpectedly like him stumbling over a temporary obstacle in his way. There is no charge of illegal and wanton negligence, and no suggestion of any showing that the Vandalia engine may have emitted steam on Jackson, which as here said is not supported by the evidence, and we need not stop to consider what effect the action of an agent of the Vandalia Company, not a party to this suit, might have if proven. There is some ground for the contention that General may have stumbled on a chunk of wood or ice in his way and thus fall between the cars, but while it is true the jury is bound to make the inference where his account seems reasonably safe and is liable if numerous obstructions are

permitted to unnecessarily be and long remain in the path of the servant, still we know no rule of law or reason that makes a master liable to his servant, whose duty it is to clean up a yard, for the presence there of stray chunks of coal or ice. It may well be assumed there were such obstacles around the quite extensive yards of appellant, it was a part of the duty of deceased to look out for them and clean them away when necessary. There is no suggestion of any thing unusual in the operation of trains in the yard at the time in question, except the alleged high rate of speed of the Lake Erie train, which we have said was not proven; and if it had been it is difficult to see that the speed of fifteen miles an hour claimed by appellee, could have caused the injury. Deceased was not struck by the engine of that train but fell between two of its cars, which would seem no more likely to happen if the speed was fifteen miles an hour than if it was eight or nine miles an hour.

The case is in some respects like Belt Ry. Co. v. Skszypezak 225 Ill. 242; and it may well be said, as in that case, that deceased had several years experience working on and around tracks and had occasion to observe the movements of trains in this yard and must have been aware of the danger of the situation, "and that it required constant vigilance to avoid injury". And as said in Wilson b. I. C. R. R. Co. 210 Ill. 603, "It is a matter of common knowledge, that work in and upon a railroad yard

permitted to unnecessarily be and long remain in the
path of the servant, still we know no rule of law or
reason that makes a master liable to his servant, whose
duty it is to clean up a yard, for the presence there
of stray chunks of coal or ice. If the yard is dangerous
there are such obstacles around the quite exclusive
parts of appellant, it was a part of the duty of deceased
to look out for them and clean them away when necessary.
There is no suggestion or any thing unusual in the
operation of trains in the yard at the time in question,
except the alleged high rate of speed of the late train
train, which we have said was not proven; and if it had
been it is difficult to see that the speed of fifteen
miles an hour claimed by witnesses, would have caused the
accident. Deceased was not struck by the engine or that
train but fell between two lines of cars, which would seem
to more likely to happen if the speed of the train were
as low than if it was eight or nine miles an hour.

The case is in some respects like that in Co. v.
Thompson 208 Ill. 489, and it will be seen, as in that
case, that deceased had several years experience working
in and around engines and had occasion to observe the
movements of trains in this yard and must have been
aware of the dangers of the situation. "and was in a
position rightfully to avoid injury". And as said in
Wilson v. I. C. R. R. Co. 208 Ill. 626, "It is a matter
of common knowledge, that most in our towns a railroad yard

with numerous tracks, where there is almost constant switching of cars and the movement of trains and engines, is extremely hazardous, and ordinary care under such conditions require a high degree of caution and watchfulness to avoid injury". And it is also true as said in Lottker v. Chicago City Railway Co. 150 Ill. App. 69, "A person employed in surroundings of the character which confronted plaintiff at his post of duty is presumed to understand the nature and dangers of his employment when he accepts it by entering upon the discharge of his duties, and to assume all the ordinary hazards of the service."

We are of the opinion that the evidence fails to show that appellants or either of them owed appellee's intestate any duty that was not performed, and that the evidence fails to show ordinary care on the part of deceased at the time of the injury. Many similar cases supporting the conclusion here reached are cited in a note in Labatt's Master & Servant, 2nd ed. Vol. 3, Sec. 1248.

Two juries have found for appellee and their conclusions are entitled to great weight, but it seems to us their verdicts must have been prompted more by that sense of sympathy and justice than has given rise to legislation to meet such cases as this, than to a careful consideration of the issues presented under the law governing the rights of the parties here.

For the reasons stated the judgment is reversed'

Finding of Facts. We find that neither of the appellants were guilty of any negligence causing the death of appellee's intestate John W. F. Berg and that he was not in the exercise of ordinary care for his own safety at the time in question.

TATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate ourt, in and for said Second District of the State of Illinois, and keeper of the Records nd Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the aid Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5903.

C. L. Roberts, appellant.

vs Appeal from Lee.

Estate of Henry L. Roberts,

deceased. appellee.

186 I.A. 314

Carnes, J.

This is a suit on a claim filed by appellant C. L. Roberts against the estate of his father Henry L. Roberts, deceased; it has been once before in this court on an appeal by the estate from a judgment in favor of the claimant. We reversed and remanded the case and afterwards on a jury trial there was a judgment in favor of the defendant estate from which the claimant appeals. Our opinion on the former hearing is reported in 175 Ill. App. 109, and we need not repeat what is there said.

This record shows the claim as filed in the County Court, it is for "Balance due on open account for money due $736,82. Interest on same 4 years at 5 per cent per annum. $146.36."

There is no date to either item but the claim is filed July 6, 1911.

On this trial the facts appear substantially as stated in our former opinion except there was the testimony of a brother of deceased that about three years before his death deceased told him he owed Roy (the claimant) quite a little, but didn't say what amount or what for; and the testimony of another witness that in December 1909 he heard claimant tell his father he might need his money in the Spring and his father said he could have it whenever he wanted it. The estate introduced experts in handwriting and much of the record is devoted to testimony on the question of the handwriting of the written memorandum on which the claimant relies

and exhibits are certified here for our examination. It seems to us after examining the whole matter, that the testimony leaves a fair question for the jury whether the memorandum is ofany probative force in support of the claim, and that there is evidence enough that it is not, to sustain a finding of the jury to that effect. Without this memorandum, while there is evidence that deceased had been indebted to the claimant insome amount, there is no evidence from which any stated amount can be reasonably ascertained.

The verdict of the jury should not be disturbed unless there is substantial error of law. It is objected that the husband of the heir, that has been defending this claim on behalf of the estate, was permitted to testify to a conversation with the claimant that occurred after the death of the father, the objection is on the ground that the witness is the husband of the heir who is defending the estate. He was a competent witness, the adverse party was not suing in a representative capacity and a husband is by statute authorized to testify in suits concerning the separate property of his wife. That the husband of an heir in a similar case is a competent witness, was held by this court in Graves v Safford, 41 Ill. App. 659. There was testimony as to grain, hay and straw furnished claimant by his father in the later years of his life, and various accounts and statements introduced in evidence to show what grain was raised by the father and what was done with it. Claimant in rebuttal offered in evidence the inventory of the estate for the purpose as he stated, of showing what stock and produce there was on the farm at the time of his fathers death. The court sustained an objection to this evidence . It may have been competent in connection with the other testimony on that subject, but it had so little bearing on the real question to be determined

and exhibits are certified here for our examination. To
seems to us, after examining the whole matter, that the tes-
timony leaves a fair question for the jury whether the sem-
blance is other conclusive force on account of the claim,
and that there is evidence enough that it is not, to sustain
a finding of the jury to that effect. Taking the circumstances,
while there is evidence that deceased had been indebted to
the claimant income amount, there is no evidence from which
any stated amount can be reasonably ascertained.

The verdict of the jury should not be disturbed unless
there is substantial error of law. It is objected that the
interest of the heir, that has been defending this claim on
behalf of the estate, was permitted to testify to a conversa-
tion with the claimant that occurred after the death of
the father, the objection is on the ground that the claimant
is the husband of the heir who is defending the estate.
He was a competent witness, the mere fact that he was not a party
in a representative capacity and a husband is by statute
authorized to testify in suits concerning the separate
property of his wife. That the husband of an heir is a competent
witness is a competent witness, was held by this court in Jones
v. Gafford, 41 Ill. App. 634. There was testimony as to gifts,
they and stock furnished clothing by his father in the latter
years of his life, and various witnesses for claimants in-
troduced in evidence to show that they visited the
father and what was done with it. Objection is raised against
in evidence the inventory of the estate for the purpose as
it stated, of showing that stock and clothes of the was on
the farm at the time of his father's death. The court overruled
an objection to this evidence. To the ruling sustaining
in connection with the other testimony on that subject, we
if had so little bearing on the real question to be decided

that we do not consider its rejection material error. There was evidence of services rendered by claimant more than five years before the death of his father, and the claim rests mainly on those services, and the argument here is that there was an admission of the debt within the five year period of the Statute of Limitations; appellant cites authorities in his brief on the burden of proof on the issue of the statute of limitations. He urges that the court erred in instructing the jury as to the Statute of Limitations and its effect, not that the instructions are not the law, but that the question of limitation was not before the jury. We do not think the point well taken.

We find no reversible error in the record, and are satisfied that the verdict of the jury is supported by the evidence.

The judgment is affirmed.

***

that we do not consider the relation material error. There was evidence of services rendered by claimant more than five years before the death of his father, and the claim rests mainly on those services, and the argument here is that there was an admission of the debt within the five year period of the Statute of Limitations, counsel cites numerous cases in his brief on the burden of proof on the issue of the statute of limitations. We urge that the court erred in instructing the jury as to the Statute of Limitations and its effect, not that the instructions were not the law, but that the question of limitation was not before the jury. We do not think the record will bear.

We find no reversible error in the record, and are satisfied that the verdict of the jury is supported by the evidence.

The judgment is affirmed.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois. and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

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186 I.A. 326

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5839.

Edward McCormick, Appellee, vs. Agnes Downs and M. E. Fleming, Appellants.	Appeal from Lee.

186 I.A. 326

Opinion by DIBELL, J.

Apellee sued appellants before a justice to recover the price of a colt alleged to have been sold by appellee to Mrs. Downs and had a judgment for $95, which was the agreed price, if there was a contract. Appellants appealed to the circuit court, where there was a verdict and a judgment for the same amount for appellee, and therefrom appellants prosecuted this further appeal.

Mrs. Downs is the daughter of Fleming and, with her husband, lived on her father's farm and her father lived elsewhere. Appellee was a mail carrier, whose route went by the farm on which Mrs. Downs lived, and he had a horse to sell. In conversations between Mrs. Downs and appellee, Mrs. Downs bought the hourse and paid appellee therefor by a colt upon the place, and agreed to keep the colt there till Fall, and did so. About November 15 or 20, 1911, there was a conversation between Mrs. Downs and appellee in which it was proposed that appellee sell the colt to Mrs. Downs for

In. Court.

Chief Secretary,

Appellee,

vs.

Appeal from Ire.

Lynne Downe and

E. L. Fleming,

Appellants.

O p i n i o n b y D I R E L . J.

Appellee sued appellants before a justice to recover the price of a colt alleged to have been sold by appellee to Mrs. Downe and had a judgment for $65, which was the agreed price, if there was a contract. Appellants appealed to the circuit court, where there was a verdict and a judgment for the same amount for appellee, and therefore appellants prosecute this further appeal.

Mrs. Downe is the daughter of Fleming and, with her husband, lives on her father's farm and her father lived elsewhere. Appellee was a mail carrier, whose route went by the farm on which Mrs. Downe lived, and he had a horse to sell. In conversation between Mrs. Downe and appellee, Mrs. Downe bought the horse and said appellee thereafter by a colt upon the place, and agreed to keep the colt there till full, and let it. About November 12 or 20, 1911, there was a conversation between Mrs. Downe and appellee in which it was proposed that appellee sell the colt to Mrs. Downe for

$95 and wait for his pay till the corn on the farm was shelled. Appellee contends that Mrs. Downs then bought the colt at that price. Although appellee's evidence in chief did not show that he accepted the final proposition of Mrs. Downs, yet when his entire testimony is considered, it appears therefrom that he sold and she bought the colt at $95, to be paid when the corn on the farm was shelled. Mrs. Downs contended that appellee required $95 cash and did not assent to her proposition to wait till their corn was shelled for his pay, and that therefore the minds of the parties did not meet and she never bought the colt. A little later the colt sickened and died. There was proof that after Mrs. Downs bought the horse, Fleming said he would pay for it or see it paid for, and that after she bought the colt he said he would see it paid for, and it is truly contended by appellants that Fleming is not liable upon those as original promises, because, standing alone, they are to pay the debt of another and are not in writing and are void under the Statute of Frauds. But there is evidence in this record that Fleming, on or about November 3, 1911, told J. R. McCormick, the father of appellee, that he owned the colt and that Mrs. Downs had no right to trade it for the horse; that he did not wish any trouble in the family; and that Fleming then requested J. R. McCormick to tell appellee to sell that colt back to Mrs. Downs and he would see it paid for; that J. R. McCormick did, within three or

$85 and wait for his pay till the corn on the farm was shelled. Appellee contends that Dorr then bought the colt at that price. Although appellee's evidence in chief did not show that he accepted the final proposition of Mrs. Dorr, yet when in making testimony in counterclaim, it appears conclusively that he did and she bought the colt at $85, to be paid when the corn on the farm was shelled. Mrs. Dorr contended that appellee required $75 cash and did not assent to her proposition to wait till their corn was shelled for his pay, and that therefore the minds of the parties did not meet and she never bought the colt. A little later the colt sickened and died. There was proof that after Mrs. Dorr bought the horse, Fleming said he would pay for it or see it paid for, and that after she bought the colt he said he would see it paid for, and it is truly contended by appellants that pleading is not limited to those as original, counties, defense, standing alone, but are to be by the aid of another and are not in pleading and are void under the Statute of Frauds. But there is evidence in this record that Fleming, on or about November 1, 1911, said J. F. McCormick, the father of appellee, that he owed the colt and that Mrs. Dorr had no right to trade it for the horse; that he did not wish any trouble in the family; and that Fleming then requested J. F. McCormick to tell appellee to call that debt back to Mrs. Dorr and he would see it paid for; that J. F. McCormick did, within three or

four days, convey that request and promise to appellee, and that appellee about two weeks later had the conversations with Mrs. Downs in which he sold the colt back to her at $95, to be paid at corn shelling time, and that he did so in reliance upon the promise of Fleming, which had been so communicated to appellee at Fleming's request by J. R. McCormick. If this evidence is true, then this was an original promise, and Fleming is liable with Mrs. Downs, and the Statute of Frauds does not apply, and the subsequent promises by Fleming were but reiterations of the fact of his liability. Fleming denied this after a fashion, and testified that, if he did say that on or about November 3, he must have been drunk, but when all his evidence is considered, he did not make an unqualified denial. It was for the jury to decide whether Mrs. Downs did buy the colt from appellee for $95 to be paid at corn shelling time, and whether her father, Fleming, had previously sent word to appellee to sell back the colt and that he would see it paid for, and whether that word was communicated to appellee before he sold the colt to Mrs Downs, and was relied upon by him in making the sale. The third instruction given at the request of the defendants to concede the liability of Fleming if the proof established those facts. On all these questions the evidence was conflicting and the jury might have found the other way. But the jury believed the witnesses forappellee and the trial judge approved that finding.

four days, convey the request and promise to appellee, and that appellee about two weeks later had the conversations with Mrs. Downs in which he told the cult book to her at $25, to be paid at some indefinite time, and that he did so in reliance upon the promise of Fleming, which had been so communicated to appellee at Fleming's request by J. E. McCormick. If this evidence is true, then this was an original promise, and Fleming is liable with Mrs. Downs, and the Statute of Frauds does not apply, and the subsequent promises by Fleming were but reiterations of the fact of his liability. Fleming denied this after a fashion, and testified that, if he did say that on or about November 3, he must have been drunk, but when all his evidence is considered, he did not make an unqualified denial. It was for the jury to decide whether Mrs. Downs did buy the cult from appellee for $25 to be paid at some indefinite time, and whether her father, Fleming, had previously and verbally to appellee to sell book the cult and that he would see it paid for, and whether that was communicated to appellee before he sold the cult to Mrs. Downs, and was relied upon by him in making the sale. The joint instruction given at the request of the defendants at remarks the liability of Fleming if the proof satisfied those facts. On all these questions the evidence was conflicting and the jury might have found the other way. But the jury believed the witnesses for appellee and the trial judge approved that finding.

We cannot see the witnesses nor hear them testify and cannot say that the jury should have found the other way nor that the trial judge should have held that the evidence did not support the verdict. We find no serious error in instruction No. 2 for appellee, of which complaint is made, and appellants' 8th instruction, which was refused, while perhaps strictly accurate, was calculated to make the jury understand that even an original promise by Fleming must have been in writing in order to bind him. We are of opinion that the jury were sufficiently and properly instructed. It is obvious that the position fo appellee has a meritorous aspect. He parted with the horse, which has been paid for only by this colt, and he never took the colt away. If the colt had not died, probably no controversy would have arisen. It is clear that before the colt became sick, appellee and Mrs. Downs did negotiate for a sale of the colt to Mrs. Downs at $95. The real difficulty as to Mrs. Downs is whether appellee said he would wait till the corn was shelled and thereby closed the contract then, or whether he went away without announcing that conclusion, and thereby left the proposed contract unclosed. As already stated, at one place in his testimony he failed to make the answer which would show the contract closed, but apparently this was merely an omission to complete the narrative, and elsewhere he

We cannot see the witnesses nor hear their testify and cannot say that the jury should have found the other way nor that the trial judge should have held that the evidence did not support the verdict. We find no serious error in instruction No. 2 for appellee, of which complaint is made, and appellants' 6th instruction, which was refused, while perhaps strictly accurate, was calculated to make the jury understand that even an original promise by Fleming must have been in writing in order to bind him. We are of opinion that the jury were sufficiently and properly instructed. It is obvious that the position of appellee has a meritorious aspect. He parted with the horse, which had been paid for only by this colt, and he never took the colt away. If the colt had not died, probably no controversy would have arisen. It is clear that before the colt became sick, appellee and Wm. Downs did negotiate for a sale of the colt to Wm. Downs at $50. The real difficulty is as to Wm. Downs is whether appellee said he would sell the colt MANNING was absent and thereby disavowed the contract then, or whether he was very ill and assuming that conclusion, and thereby left the proposed contract unclosed. As already stated, at one place in his testimony he failed to make the answer which would show the contract closed, but apparently this was merely an omission to complete the narrative, and although on

remied that. On motion for a new trial an affidavit of newly discovered evidence was presented. It tended to support the evidence of Mrs. Downs, but was not conclusive. It was by a relative, who claimed to have been present at the time appellee says he sold the colt. It was at least careless that she did not remember or ascertain the presence of that relative before the trial.

The judgment is affirmed.

tested that. On motion for a new trial an affidavit of newly discovered evidence was presented. It tended to support the evidence of Mrs. Downs, but was not cumulative. It was by a relative, who claimed to have been present at the time suggested may be said the coit. It was at least credible that she did not remember or ascertain the presence of that relative before the trial.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

_____
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5844

W. Heller and Sons, appellees

vs Appeal from Peoria.

Illinois Traction Company et al

appellants.

Dibell, J.

Appellees deal in metal, scrap iron and junk. One Vance was purchasing agent for appellants, who had a carload of metal or junk at Decatur for sale. Samuel Heller one of the appellees, ~~inquired~~ inquired of Vance what he had to offer in the way of such material and was told that he had a car load of junk at Decatur for sale. Said appellee went to the office of Vance and was furnished with a paper showing the different kinds of metals in said car, namely: brass, copper, white borings, yellow borings, brass and iron copper and iron, and the number of pounds of each kind. Heller inquired what the white borings were and Vance was unable to state, but told him to go to Decatur and inspect the white borings so that he would know exactly what they were. Heller sent one of his partners to Decatur and the latter inspected the white borings and saw the carload of metal , and then Heller gave Vance prices per pound which he would give for the different kinds of metal specified, and after some delay in an effort to get a better bidder, that offer was accepted. Appellees bought said carload of metals and paid the prices they had offered for the weight of each kind as specified in the memorandum, amounting in all to $4,040.60. When appellees received the carload they weighed the different metals as unloaded and found a small amount of shortage in weight on several items, but especially found that there was very much less "brass" than the bill specified, and there was a very much greater weight of the item of "brass and iron". They had paid eight cents per pound

Nos. 36, 37&38

T. Haller and Jose, respondents

vs. Appeal from Tacoma.

Illinois Junction Company et al

appellants.

Filed, 1.

Appellees had in stock, scrap iron and junk. One Vance was purchasing agent for appellants, who had a quantity of metal or junk at Everett for sale. Samuel Haller, one of the appellees, frequent inquired of Vance what he had to offer in the way of such material and he said that he had a car load of junk at Tacoma for sale. This conversation took place in the office of Vance and was furnished with a paper showing the different kinds of metals in said car, namely: brass, copper, white bearings, yellow bearings, brass and iron scrap and iron, and the number of pounds of each kind. Haller inquired what the white bearings were and Vance was unable to state, but told him to go to Tacoma and inspect the white bearings so that he would know exactly what they were. Haller sent one of his partners to Everton and the latter inspected the white bearings and saw the material of equal , and when Haller gave Vance orders for yellow brass he would give for the different kinds of metal specified, and after some delay in an effort to get a better price, that offer was accepted. Appellees brought suit claiming of vendee and paid the price they offered for the material of such kind as specified in the memorandum, amounting in all to $4,040.80. When appellees received the material they weighed the different metals on wagons and found a small amount of shortage in weight in certain items, but considerably found that there was very much less "Brass" than the bill specified, and there was a very much greater weight of the item of "Brass and iron". That the junk might reach car among

for the "brass and iron" and ten cents per pound for the "brass", consequently the appellants had been paid more than the material came to at the agreed prices. Appellees sued appellants to recover the amount of the over payments, and had a verdict and a judgment for $305.82 from which defendants below appeal.

Appellees proved the amount of shortage on each of the items and that the difference between what they did receive and what they should have received at the rates named, amounted to $305.82. There was practically no dispute as to that fact. Appellants concede that, as to three of the items, they are liable for the amount which was paid for and which appellees did not receive. The principal shortage in weight however, was on the item of "brass" and there was an equal amount of weight in excess on "brass and iron", and appellants contend that they did not warrant the brass to be free from iron and therefore that part of the recovery was erroneous. By the written memorandum, appellants sold appellees 23545 pounds of brass at ten cents per pound, and, in our opinion, were bound to deliver that quantity of brass. Appellants could not fill this with "brass and iron" which they had agreed to sell at eight cents per pound. Appellants argue that appellees cannot recover this shortage because one of the appellees inspected the carload at Decatur. All that the inspection was for was to ascertain what was meant by "white borings". He had no opportunity to ascertain the weights of each kind. The metal was at that time all loaded in a mass in the car. The principles governing this case are stated in Columbia Iron Works v Douglass 53 L. R. A. 103 and in that portion of a note found in 35 L. R. A (N.S.) on p. 291. It is contended that the instructions are incorrect, and it may be that they are subject to some ex

for the "brass and iron" and ten cents per pound for the "brass", consequently the appellants had been paid more than the material came to at the agreed prices. Appellees and appellants to recover the amount of the over payment, and had a verdict and a judgment for $202.88 from which defendants below appeal.

Appellees proved the amount of scrap on each of the items and that the difference between what they did receive and what they should have received at the rates named, amounted to $202.88. There was practically no dispute as to that fact. Appellants contend that, as to three of the items, they are liable for the amount which was paid for and which appellees did not receive. The principal shortage in weight however, was on the item of "brass" and there was an equal amount of weight in excess on "brass and iron", and appellants contend that they did not warrant the brass to be free from iron and therefore that part of the recovery was unconscionable. By the written memorandum, appellants sold appellees certain pounds of brass at ten cents per pound, and, in our opinion, were bound to deliver that quantity of brass. Appellants could not fill this with "brass and iron" which they had agreed to sell at eight cents per pound. Appellants argue that appellees failed to prove the market price of the brass they received from Decatur.

All that the importation was for was to ascertain what was meant by "white bottoms". He had no opportunity to ascertain the weights of each kind. The total was at that time all loaded in a mass in the car. The principles governing this case are stated in Chicago Iron Works v. Hopkins 83 N. E. 100 and in that portion of a note found in 21 L. R. A. (N.S.) on p. 944. It is contended that the transactions are unconscionable, and it may be that they are unjust to some man

criticism. But under the evidence, no other verdict could have been returned, and we are of the opinion that the judgment should stand, regardless of the instructions.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5847.

Alma Shurlow,
Appellee,
vs
Lester J. Hoadley,
Appellant.

Appeal from La Salle.

186 I.A. 328

Opinion by DIBELL, J.

Between eight and nine o'clock in the evening of July 6, 1910, when the moon was not shining, George Shurlow was driving south on the west side of a street in the city of Earlville in La Salle County, in a top buggy with the top down, and his wife, Alma Shurlow, was riding with him on the left hand side of the seat, carrying a babe in her arms. Lester J. Hoadley came up behind this buggy, driving an automobile owned by him in which were several other persons. He turned out to the left to go by this buggy and struck the hind wheel of the buggy with has right hand light and "dished" the wheel and that corner of the buggy went down to the ground and Mrs. Shurlow was injured. She brought this suit against the owner and driver of the automobile to recover damages for said injuries. She filed a declaration containing three counts and during the trial filed an additional count. Defendant pleaded the general issue to the three counts and it was stipulated that it should stand to the additional count and that all defenses

No. 3447.

Alma Shurlow,

Appellee,

vs.

Appeal from La Salle.

Lester J. Moadley,

Appellant.

O p i n i o n b y D I E H L, J.

Between eight and nine o'clock in the evening of July 6, 1910, when the moon was not shining, George Shurlow was driving south on the west side of a street in the city of Ransville in La Salle County, in a top buggy with the top down, and his wife, Alma Shurlow, was riding with him on the left hand side of the seat, carrying a babe in her arms. Lester J. Moadley came up behind this buggy, driving an automobile owned by him in which were several other persons. He turned out to the left to go by this buggy and struck the hind wheel of the buggy with his right hand light and "disabled" the wheel and that corner of the buggy went down to the ground and Mrs. Shurlow was injured. She brought this suit against the owner and driver of the automobile to recover damages for said injuries. She filed a declaration containing three counts and during the trial filed an additional count. Defendant pleaded the general issue to the three counts and it was stipulated that it should apply to the additional count and that all defenses

could be introduced under said plea. The first count was trespass vi et armis and apparently the proofs made no case under that count. The second count charged that defendant negligently caused his automobile to collide with the buggy and thereby plaintiff was injured. The third count charged the duty of defendant at that time of the night to carry two lighted lamps showing white lights, visible at least 300 feet in the direction towards which said motor car was then proceeding, and that defendant did not have such lights, but negligently and unlawfully ran his automobile without the lamps required by law and negligently ran into the rear of said buggy and thereby caused said injuries. The additional count was to the same effect. Mrs. Shurlow had a verdict and a judgment for $2,000, from which Hoadley appeals.

The automobile was provided with two acetlene gas headlights, and with two kerosene lights a short distance back of those and on the side. The acetylene lamps were not lighted. The kerosene lamps were burning. Appellee contended that appellant did not have lamps burning of the strength required by law. Appellant contended that his lights complied with the statute. Appellee's proofs tended to show that when the collision was over, she was seated on the front axle between the left front wheel and the buggy box and facing north. Appellant contended that she was not out of the box of the buggy until she was assisted to alight. The babe was

could be introduced under said plea. The first count was treated at at ante and apparently the proofs made on case under that count. The second count charged that defendant negligently caused his automobile to collide with the buggy and thereby plaintiff was injured. The third count charged the duty of defendant to that kind of the night to carry two lighted lamps showing white lights, visible at least 500 feet in the direction towards which said motor car was then proceeding, and that defendant did not have such lights, but negligently and unlawfully ran his automobile without the lamps required by law and negligently ran into the rear of said buggy and thereby caused said injuries. The additional count was to the same effect. Mrs. Shurlow had a verdict and a judgment for $2,500, from which defendant appeals.

The automobile was provided with two acetylene gas headlights, and with two kerosene lights a short distance back of those and on the side. The acetylene lamps were not lighted. The kerosene lamps were burning. Appellee contended that appellant did not have lamps burning of the strength required by law. Appellant contended that his lights complied with the statute. Appellee's proofs tended to show that when the collision was over, she was seated on the front-side between the left front wheel and the buggy box and facing north. Appellant contended that she was not out of the box of the buggy until she was assisted to alight. The body

unhurt. Appellee was treated three times by a physician for bruises. Long afterwardsshe was examined by expert physicians for the purpose of this trial and they discovered a broken rib and a floating kidney, which appellee attributes to this accident and appellant denies were produced thereby.

These expert witnesses were permitted to testify for appellee, over the objection of appellant and in answer to hypothetical questions, that, in their opinion, the fractured rib and dislocated kidney were due to this accident. This was one of the questions to be determined by the jury. Appellee's proofs authorized the recovery of slight damages only, unless the broken rib and floating kidney were caused by the accident. If they were, then she was entitled to substantial damages. The law does not permit the opinion of an expert witness to be given determining the ~~practic~~ precise point to be decided by the jury. It would have been competent to prove by these physicians that in their opinion this rib could have been broken and this kidney dislocated by an accident of this character. I. C. R. R. Co. v. Smith, 208 Ill. 608; Keefe v. Armour, 258 Ill. 28, and cases there cited. The ruling was erroneous.

The fourth instruction, given at the request of appellee, stated the statute of this State requiring each motor vehicle travelling upon a public highway during the period from sunset to one hour before sunrise to carry

[illegible]. Appellee was treated three times by a physician for bruises. Long afterwards she examined by expert physicians for the purpose of this suit and they discovered a broken rib and a limping gait, which appellee attributes to this accident and appellant denies was pre-exist[illegible].

These expert witnesses were placed on the stand for appellee, over the objection of appellant and in answer to hypothetical questions, that, in their opinion, the fractured rib and dislocated kidney were due to this accident. This was one of the questions to be determined by the jury. Appellee's proofs authorized the recovery of slight damages only, unless the broken rib and injured kidney were caused by the accident. If they were, then she was entitled to substantial damages. The law does not permit the opinion of an expert witness to be given determining the [illegible] point to be decided by the jury. It would have been competent for proof of these physicians that in their opinion this rib could have been broken and this kidney dislocated by an accident of this character. I. C. R. R. Co. v. Welch, 208 Ill. 268; Lake v. Conner, 229 Ill. 58, and cases there cited. The ruling was erroneous.

The Fourth Instruction, given in the behalf of appellee, asked the [illegible] of this Court whether a passenger while travelling upon a public highway during the period from sunset to one hour before sunrise is [illegible]

two lighted lamps, showing a white light visible at a distance of 200 feet in the direction towards which said motor ~~xxxxxx~~ vehicle was proceeding, and instructed the jury that if they found from the greater weight of the evidence that at the time in question appellant was driving his automobile on a public street in the same direction that the carriage was going in which a pellee was riding, without carrying the lights required by said statute, in the night time , and that while so driving his automobile he struck the rear of the carriage in which appellee was riding and broke the same and threw appellee out of the carriage and injured her, as alleged in some count of the declaration, then they should find appellant guilty and assess appellee's damages. The fifth instruction, given at the request of appellee, was in substance the same. Each of these instructions was erroneous. They did not submit to the jury the question whether the failure to comply with the statute caused or contributed to the injury. The mere fact that appellant violated the statute, if he did so, gave no cause of action, to appellee. She must have been injured because he violated the statute, in order to give her a cause of action for his violation of the statute. A violation of certain other provisions of the motor vehicle law is by statute made prima facie evidence of certain things, but there is no such provision in the statute in relation to the failure to carry sufficient lights. This instruction did not submit

two lighted lamps, showing a white light visible at a distance of 500 feet in the direction towards which said motor vehicle was proceeding, and instructed the jury that if they found from the greater weight of the evidence that at the time in question appellant was driving his automobile on a public street in the same direction that the buggy was going in which a police was riding, without carrying the lights by said statute, in the night time , and that while so driving his automobile he struck the rear of the buggy in which appellee was riding and broke the same and threw appellee out of the buggy and injured her, as alleged in some counts of the declaration, then they should find appellant guilty and assess appellee's damages. The fifth instruction, given at the request of appellee, was as follows the same. Each of these instructions was erroneous. They did not submit to the jury the question whether the failure to comply with the statute caused or contributed to the injury. The mere fact that appellant violated the statute, if he did so, gave no cause of action, to appellee. She must have been injured because he violated the statute, in order to give her a cause of action for the violation of the statute. A violation of certain other provisions of the motor vehicle law is by statute made prima facie evidence of certain things, but there is no such provision in the statute in relation to the failure to carry sufficient lights. This instruction did not submit

to the jury the question whether appellant operated his automobile in a negligent manner as charged. In effect, this instruction told the jury that if appellant did not carry as strong a light as required by statute, then for that reason alone appellant would be liable to appellee for those injuries. In our judgment the errors hereinabove pointed out require the submission of the cause to another jury.

Several other things require mentioning, that they may be avoided upon another trial. Appellee, over the objection of appellant, succeeded in getting before the jury the poverty of her husband, and an appeal was made to the jury in behalf of "her little family of children." The latter remark was withdrawn, but the effect was likely to remain. Appellee was not entitled to vindicate damages, but only to compensation, and that would be the same whether she was rich or poor and whether she did or did not have children. The natural effect of this proof and of this remark would be to produce sympathy for her in the minds of the jury. Appellee's counsel, in addressing the jury, sought to cause the jury to look with suspicion upon the instructions to be given by the court on behalf of appellant. We consider such a course of action improper. J. J. & J. R. R. Co, v. Otstat, 212 Ill. 489 ; Mothersill

v. Voliva, 158 Ill. App. 16. There was other like occurrence during the trial. In many cases the court sustained appellant's objections, but we are of opinion that the evil effects of these improper things were not likely to be removed from the minds of the jury.

The judgment is reversed and the cause remanded.

v. Tolin, 175 Ill. App. 16. There was other like
evidence during the trial. It must cause the death
sentence appellant's objections, but we are of opinion
that the evil effects of these improper things were not
likely to be removed from the minds of the jury.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5860

Daniel Donovan, appellee

vs Appeal from Co. Ct. Lee.

John Ingoldsby, appellant.

Dibell, J.

186 I.A. 335

Donovan sued Ingoldsby in the county court of Lee County and filed a declaration containing a special count and the common counts and afterwards filed a bill of particulars and afterwards filed additional counts. We think it sufficient to say of the special counts that they stated a valid cause of actionagainst defendant. He filed a plea of the general issue and a plea of the statute of frauds. A jury was waived and the proofs were heard and plaintiff had a judgment against defendant for $361.50 and costs, from which defendant below appeals.

The proofs introduced by appellee tends to show the following facts. James F. Daley and Alice Daley were husband and wife and were residents of Lee County. James F. Dailey owned considerable real estate in Lee County, upon which there were mortgages and upon which judgments against him were liens. He conveyed this real estate to Alice Daley upon an expressed consideration of $5,000. but the real consideration was an agreement by her that she would pay all his debts. One of those debts was a promissory note, payable to the order of appellee, signed by James F. Daley and J. B. Clears, dated May 12, 1903, due one year after date, for the principal sum of $200 with interest at six per cent per annum. Daley died soon thereafter. Mrs. Daley paid interest on this note up to May 12, 1908. She sold some of the real estate which her husband had conveyed to her and with the proceeds paid off judgments which were liens on the real estate. She expressly promised to pay this Donovan Note as a part of the consideration for the lands. She became very ill and was in the hospital and sent for appellant, who was her brother, and

Dec. 5, 1900

Daniel Donovan, appellee

vs Appeal from Co. Ct. Lee.

John Shepherd, appellant.

Daniel, J.

Donovan sued Impleby in the county court of Lee County and filed a declaration containing a special count and the common counts and afterwards filed a bill of particulars and afterwards filed additional counts. To this it appears in any of the special counts that they stated a valid cause of action against defendant. To this plea of the general issue and a plea of the statute of frauds. A jury was waived and the proofs were heard and plaintiff had a judgment against defendant for $221.50 and costs, from which defendant takes appeals.

The proofs introduced by appellee tends to show the following facts. James F. Daly and Alice Daly were husband and wife and were residents of Lee County. James F. Daly owned considerable real estate in Lee County, upon which there were mortgages and upon which judgments against him were liens. He conveyed this real estate to Alice Daly upon an increased consideration of $3,000. But the real consideration was an assignment by her that she would pay all his debts. One of those debts was a promissory note, payable to the order of appellee, signed by James F. Daly and J. T. Shepard, dated May 12, 1898, due one year after date, for the principal sum of $300 with interest at six per cent per annum. Daly died soon thereafter. Mrs. Daly made inquiry on this note on to May 12, 1898. She told some of his real estate which she had conveyed to her and with the proceeds paid off judgments which were liens on her real estate. She practically insisted to pay this Donovan note as a part of the consideration for the lands. She became very ill and was in the hospital and sent for appellant, who was her brother, and

proposed to convey to him the remaining real estate, in consideration for which he should pay her debts, including the debts of James F. Daley. He made inquiries into the equity in the lands over and above the mortgages upon them and found that it was some $6,000 or $7,000. He accepted her proposition and she conveyed the lands to him. This particular note, due to Donovan, was one of the items which were named to him and which he agreed to pay, as also a small bill of $2.37 on an open account. He paid various debts owing by Mrs. Daley including some debts which were originally owned by James F. Daley. Through his attorney he offered to pay the principal of this note, but refused to pay the interest. The evidence introduced by appellant tended to show that all he agreed to pay for the land was the mortgage indebtedness and to take care of his sister and to furnish her burial. The evidence seems to preponderate in favor of appellee. If the trial judge believed the proof introduced by appellee, appellant was liable for this debt. The trial judge did believe these witnesses, and it is impossible that we should say that he should have disbelieved them and should have believed the witnesses introduced by appellant.

It is possible that the rulings of the trial court in admitting evidence for appellee were not in all cases correct, but the law is that where an action at law is tried by a judge without the intervention of a jury, the admission of incompetent evidence will not be ground for reversal, if there is sufficient competent evidence to sustain the finding. Palmer v Meriden Brittania Co. 188 Ill. 508; Iroquois Furnace Co. v Elphicke, 200 Ill. 411; Grand Pacific Hotel Co. v Pinkerton, 217 Ill. 61, and cases there cited. It is clear that this record does contain competent evidence sufficient to support the finding. We find it unnecessary to uncumber the

proposed to convey to him the remaining real assets, in consideration for which he should pay her debts, including the debts of James T. Daley. The judge directed that the equity in the lands over and above the mortgages upon them should be found when it was some $4,000 or $5,000. He accepted the proposition of the conveyed his lands to him. This particular note, due to Donovan, was one of the items which this bond, to him and which he agreed to pay, he held a total bill of $8,97 on an open account. He had various debts owing by him. Daley included some debts which were originally owned by James T. Daley. Through his attorney he offered to pay the principal of this note, but refused to pay the interest. The evidence introduced by plaintiff tended to show that all he agreed to pay for the land was the mortgage indebtedness and to take care of his sister and to furnish her burial. The evidence seems to preponderate in favor of appellee. If the trial judge believed the proof introduced by appellee, appellant was liable for this debt. The trial judge did believe these witnesses, and it is impossible that we should say that he should have disbelieved them and should have believed the witnesses introduced by appellant.

It is possible that the findings of the trial court in admitting evidence for appellee were not in all cases correct, but the law is that where an action at law is tried by a judge without the intervention of a jury, the admission of incompetent evidence will not be ground for reversal, if there is sufficient competent evidence to warrant the finding.

Tucker v. Dorsey, 3a. 124 Ill. 2nd Tri. Cent. Trust Co. v. Kipnotis, 302 Ill. 431; Chicago Traction Co. v. Thompson, 217 Ill. 83, and cases therein cited. It is true that the judge here weighed conflicting evidence and by support the finding. We find it unnecessary to discuss the

record with a detailed statement of the evidence of each witness. No propositions of law were presented.

The judgment is affirmed.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5867

William F. Mehlenbeck, appellant.

vs Appeal from Peoria.

John Steitz, appellee.

Dibell, J.

Appellant sued appellee before a justice to recover a loan of $50.00 and had judgment. The defendant below appealed to the circuit court, where, on a jury trial, defendant below had a verdict and a judgment, from which plaintiff below appeals.

Appellee was about to go to Florida with one Nichols, and Nichols had promised to furnish him $100 for the trip. Appellant testified that appellee called him up over the telephone, and arranged that appellant should loan appellee $50.00 and that appellee and Nichols met at appellant's shop and appellant loaned appellee $50.00 and Nichols furnished some additional money. Nichols testified that he did not arrange with appellant over the telephone, and did not borrow the money from appellant, but that it was borrowed by appellee and he added $10.00 to it. Appellee testified that he did not converse with appellant over the telephone on this subject, and that he did not borrow the $50.00 from appellant; that he and Nichols met at appellant's shop, and Nichols said that he was unable to get the money that he had promised appellee, but that appellant would help him out, and that appellant counted out $50.00 and delivered it to Nichols and Nichols added $10.00 to it and pushed the $60.00 across the table to appellee, and the latter took it, and that he did not borrow it from appellant. Appellee also testified that he had since paid Nichols the $60.00 but this was excluded. Appellant contends that he had the preponderance of the evidence, and the verdict should havebeen for him, and

Sup. Ct. 1921

WILLIAM T. MORISSEY, APPELLANT,

vs.

ALBERT LEE PRATT.

John Trebla, appellee:

Ribell, J.

Appellant gave appellee notes & jewelry to recover a loss of $20.00 and had judgment. The defendant then appealed to the circuit court, where, on a jury trial, defendant below had a verdict and a judgment, from which plaintiff below appeals.

Appellee was about to go to Florida with one Nichols, and Nichols had promised to loan him $100 for the trip. Appellant testified that appellee called him up over the telephone, and stating that Nichols would loan appellee $50.00 and that appellee had $50.00 and Nichols put appellant's $50.00 and appellant lended appellee $50.00 and Nichols loaned some additional money, Nichols testified that he had arranged with appellant over the telephone, he did not have the money from appellant, but that it was borrowed by appellee and he added $20.00 to it. Appellee testified that he had had arrangements with appellant over the telephone or some method, and that he did not borrow the $50.00 from appellant; that he and Nichols put at appellant's. Then, and Nichols said that he was unable to put the money that he had received, appellee, but that appellant would help him out. And that appellant counted out $50.00 and delivered it to Nichols and Nichols added $20.00 to it and passed the $50.00 across the table to appellee, saying that it, and that it did not course it from appellant. Appellee also testified that he had stated well Nichols the $50.00 but that was withdrawn. Appellant contends that he has the preponderance of the evidence, and the trained court instructed for him, and

the court should have awarded a new trial. We perhaps would be better satisfied if the verdict had been for appellant, although the testimony of appellee appears to us more straightforward than that of appellant and Nichols. But it does not follow necessarily that where there is one witness on one side and two on the other the jury must believe the two in preference to the one. The jury may have seen that in the demeanor of these witnesses on the stand which caused them to believe appellee. Maggart v Peoria Ry. Co. 179 Ill. App. 229. We can only set aside such a verdict when we can see that the verdict is manifestly against the weight of the evidence. I. C. R. R. Co. v Gillis, 68 Ill. 317. Lourance v Goodwin, 170 Ill. 390. Chicago City Railway Co. v McClain 211 Ill. 589. Donelson v East St. Louis Ry. Co. 235 Ill. 625. The trial judge heard these witnesses, and refused a new trial. We cannot say that it is clear he erred in so doing.

Appellant contends that the court erred in instructions given for appellee. Appellant moved for a new trial, and filed written grounds for the motion, and did not include in said written grounds any reference to the action of the court upon the instructions. Under such circumstances, he is confined in this court to the reasons specified in writing, and has waivedall others. Matthews v Granger, 196 Ill. 164. Yarber v C. & A. Ry. Co. 235 Ill. 589. Section 81 of the Practice Act, as amended in 1911, obviates the necessity of an exception, but does not affect the rule laid down in the cases just cited.

The judgment is therefore affirmed.

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the court should have granted a new trial. The decision would be better satisfied if the verdict had been for any plaintiff, although the testimony of appellee appears to be more clearly-forward than that of appellants and Nicholas. But it does not follow necessarily that where there is one witness on one side and two on the other the jury must believe the two in preference to the one. The jury may have seen that in the demeanor of these witnesses on the stand which caused them to believe appellee. Maggert v Peoria Hy. Co. 172 Ill. App. 329. We can only set aside such a verdict when we can see that the verdict is manifestly against the weight of the evidence. I. C. R. R. Co. v Ellis, 93 Ill. 313. Lawrence v Goodwin, 170 Ill. 370. Chicago City Railway Co. v McGlynn 141 Ill. 589. Donelson v West St. Louis Hy. Co. 134 Ill. 656. The trial judge heard these witnesses, and refused a new trial. We cannot say that it is clear he erred in so doing.

Appellant contends that the court erred in instructions given for appellee. Appellant moved for a new trial, and filed written grounds for the motion, and did not include in said written grounds any reference to the action of the court upon the instructions. Under such circumstances, he is confined in this court to the reasons specified in writing, and has waived others. Matthews v Gaenger, 190 Ill. 184. Lerner v C. & A. Hy. Co. 235 Ill. 329. Section 22 of the Practice Act, as amended in 1911, obviates the necessity of an exception, but does not affect the rule laid down in the cases just cited.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois. and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5872.

Frank P. Hawkins, et al, Appellees, vs, Harry L. Taylor, Appellant.	Appeal from County Court of Lake County.

186 I.A. 355

Opinion by DIBELL, J.

This suit was brought in April, 1913, by Frank P. Hawkins and Richard W. Hawkins, partners doing business as Frank P. Hawkins and Company, to recover a commission from Harry L. Taylor for the sale of certain real estate belonging to Taylor, located in Highland Park in Lake County. Upon a jury trial, plaintiffs below recovered a verdict and a judgment for $150, from which defendant below appeals. In addition to the verdict for that amount in favor of plaintiffs below, the jury also returned a special finding that plaintiffs were the procuring and efficient cause of bringing about the sale of the property in question.

Frank P. Hawkins and Richard W. Hawkins are engaged in the real estate business in Highland Park in Lake County and have been for many years. Harry L. Taylor, appellant here, lived in Highland park and owned a house and lot there. In June, 1912, appellant put this real estate in the hands of appellees for sale and named a price for which he would sell. Appellees showed the premises to various persons, and among them one Charles F. Drake.

Drake and appellees had various interviews regarding the proposes deal, in the course of which the price asked by appellant was mentioned, but appellees never succeeded in concluding the sale with Drake. Finally, in February, 1913, Drake told appellees that he had been to see appellant personally and that they had come to terms and had executed a contract of sale. Appellees never received any commissions on this sale from appellant and upon failure to do so, brought this suit. Richard W. Hawkins, one of appellees, was the only witness for them, while Drake and appellant were the only witnesses for him, and there are numerous contradictions in their testimony. Appellees claim that they told appellant they were negotiating with Drake for the purchase of the property; that they knew n nothing of any negotiations between appellant and Drake directly until after the contract of said had been executed; that appellant never told appellees to do nothing more about the sale of his property; that appellant later told appellees he needed money for other purposes and would reduce the price he had asked at first by $500; and that, when Drake informed appellees that a contract of sale had been executed, he told them he thought they were entitled to a commission from appellant and that he, Drake, would helpthem to get it. Appellant claims that he told appellees they need do nothing further in the matter some time before he entered into negotiations with Drake. He does not recall whether or not he told Drake that he would take care of appellees in the matter of commissions.

He also claims that he did not know that appellees were engaged in any negotiations with Drake for the sale of these premises.

In view of the above testimony, appellant claims that the preponderance of the evidence was clearly with him and that the verdict of the jury was against the greater weight of the evidence and shouldnot stand. We are unable to agree with appellant in this contention. The fact that two witnesses testified for appellant and but one for appellees does not necessarily require that the jury should believe the two in preference to the one. The jury may have seen that in the demeanor of the two witnesses for appellant which caused it to put less confidence in their testimony than in that of appellees' one witness. By denying the motion for a new trial, the trial judge has approved the verdict of the jury and we can find nothing in the record, that would justify us in holding that the action of the trial judge, in upholding the verdict, was erroneous. Maggart v. Peoria Ry. Co, 179 Ill. App. 239. By their verdict and their special finding, it is evident that the jury considered that appellees had been authorized to bring about a sale of appellant's property; that they had gone about that matter diligently and had shown the property to different prospective purchasers of real estate in that vicinity; that they had mentioned to appellant the name of Drake as one of such prospective purchasers; and that they were still negotiating with Drake

and were endeavoring to persuade him to purchase this particular piece of property when appellant entered into direct communication with Drake upon the same subject and consummated the sale. There is evidence in the record to justify the jury in so believing, and the jury are the judges of the facts. If appellees were the procuring and efficient cause of the sale, as the special verdict found, then appellees were entitled to recover, through the owner completed the negotiations. Rigdon v. More, 336 Ill. 382.

Moreover, the abstract does not show that the bill of exceptions contains a motion for a new trial, and hence it does not show that the sufficiency of the evidence to support the verdict is presented by the record. Yarber v. C. & A. Ry. Co 235 Ill. 589. The clerk's record cannot supply this omission. People v. Faulkner, 348 Ill. 156. Turning to the bill of exceptions in the record itself, we find it is only by inference that it can be held to show that appellant made a motion for a new trial.

The judgment is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5875

Charles M. Henderson, appellee

vs Appeal from Co. Ct. McHenry.

Frank Blakesley, appellant.

Dibell, J.

Henderson Henderson ran a farm ditching machine, and dug a ditch across lands of one Howe, and to reach an outlet dug sixteen and a half rods across a small piece of land owned by Blakesley. He charged Blakesley $1.50 a rod therefor, and sued Blakesley before a justice of McHenry County, and had a judgment for $24.75, the amount claimed. Blakesley appealed to the county court, where Henderson had a verdict and a judgment for the same amount, from which latter judgment Blakesley appeals to this court.

Appellant claims that there was an irregularity in the empanelment of the jury. This is not shown in the bill of exceptions. It does not appear that he made any objections to the course pursued. The record does not present that question for review.

Appellee testified that the work was done under an express contract between them that he should dig the ditch for appellant across appellant's land and that appellant should pay appellee therefor $1.50 per rod, and proved that he did the work. He testified that he sent appellant a bill therefor, and that he afterwards met appellant, who pleaded hard times and said he would have money later, but did not pay it. Appellee was corroborated to some extent. Appellant testified that he made no such contract with appellee, but that he gave appellee permission to cross his land with the ditch, if Howe the land owner who would be benefited by the ditch, would pay for it, and that appellee said he would charge the work to Howe. Appellee testified denying

Cur. Op. 1877

Charles V. Hendrson, appellee

vs. Appeal from Co. Ct. Mahony.

Frank Blakeslay, appellant.

Opinion, J.

Hendrson Hendrson ran a farm ditching machine, and dug a ditch across lands of one Howe, and to reach an outlet dug sixteen and a half rods across a small piece of land owned by Blakeslay. He charged Blakeslay $1.50 a rod therefor, and sued Blakeslay before a justice of Mahony County, and had a judgment for $24.75, the amount claimed. Blakeslay appealed to the county court, where Hendrson had a verdict and a judgment for the same amount, from which latter judgment Blakeslay appeals to this court.

Appellant claims that there was an irregularity in the empanelment of the jury. This is not shown in the bill of exceptions. It does not appear that he made any objections to the course pursued. The record does not present this question for review.

Appellee testified that the work was done under an express contract between them that he should dig the ditch for appellant across appellant's land and that appellant should pay appellee therefor $1.50 per rod, and proves that he did the work. He testified that he sent appellant a bill therefor, and that he afterwards met appellant, the latter said times and that he would have money later, but did not pay it. Appellee was corroborated to some extent. Appellant testified that he made no such contract with appellee, but that he gave appellee permission to open his land with the ditch, if thereby the land began the work, and that appellee would by the ditch, would pay for it, and that appellee did not complete the work to Howe. Appellee testified during

this. Appellant argues that the evidence was evenly balanced, and therefore appellee made no case, and that the court should have directed a verdict for appellant at the close of the proofs and should have granted a new trial. Appellant did not present any motion to direct a verdict and offered no instruction to that effect, and no such question is presented by the record. The court at the request of appellant fully instructed the jury to reconcile the testimony of the witnesses if they could, and if they could not, then to determine from all the evidence which witnesses were entitled to the greater credit, and that, unless the appellee had established his case by a preponderance of the evidence, or if the evidence was evenly ~~dixi~~ balanced, they should find for appellant. It is not the law that if the n m-ber of witnesses on each side of an issue is equal, the evidence is therefore evenly balanced and that he who has the affirmative of the issue must fail. The jurors may have seen that in the demeanor of appellee and of appellant, when testifying, which caused them to believe appellee and not appellant. The trial judge did not deem it his duty to grant a new trial. The record does not warrant us in disturbing his conclusion. Maggart v Peoria Ry. Co. 179 Ill. App. 229. If the verdict does not seem to us manifestly against the weight of the evidence, we are not authorized to disturb itmerely because we are in doubt whether the weight of the evidence sustains it. I. C. R. R. Co. v Gillis, 68 Ill. 317; Lourance v Goodwin 170 Ill. 390; Chicago City Ry. Co. v McClain 211 Ill. 589; Donelson v East St. Louis Ry. Co. 235 Ill. 625. We cannot say the court should have granted a new trial.

The court refused four instructions requested by appellant The first seems not to have been based upon any proof, and was against appellant's interest, and he was not harmed by its refusal. The second and fourth are embodied in given instructions. The third said that if the minds of the parties did not come together upon all the terms and conditions of the alleged contract, appellee could not recover. This was too broad, as applied to this case. The pleadings were oral. Appellant testified that appellee said nothing about the price. If the parties agreed that appellee should dig the ditch for appellant, but the price was not named, and appellee dug the ditch and sent appellant a bill , charging him therefor $1.50 per rod, and appellant retained the bill without objection after the expiration of a reasonable time within which to object to the price charged, this tended to establish an admission and acquiescence in the correctness of the price charged, even if it had not the force of a stated account in a dealing between a customer and a merchant. McCord v Hanson, 17 Ill. App. 118; Weigle v Brautigam 74 Ill. App. 285; 52 L. R. A. 602, note; 26 L. R. A. (N. S.) 334 to 351, note. The instruction was properly refused.

The judgment is affirmed.

**

The court refused to give instructions requested by appellant. The first seems not to have been based upon any proof, and was against appellant's interest, and is one not issued by his request. The second and fourth are embodied in given instructions. The third and last of the minds of the jurors does not come together upon all the terms and conditions of the alleged contract, appellee could not recover. That was the issue, as implied in this case. The plaintiff was correct. Appellant requested that appellee sell nothing, lower the price. If the parties agreed that appellee should dig the ditch for appellant, but the price was not named, and appellee dug the ditch and sent appellant a bill, charging him therefor $1.50 per rod, and appellant retained the bill without objection after the expiration of a reasonable time within which to object to the price charged, this tended to establish an admission and acquiescence in the correctness of the price charged, even if it had not the force of a stated account in a dealing between a customer and a merchant. Mobord v Mason, 17 Ill. App. 158; Teigle v Kruzik, 74 Ill. App. 358; 30 L. R. A. 702, note; 78 L. R. A. (N. S.) 144 to 321, note. The instruction was properly refused.

The judgment is affirmed.

**

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5878

M. H. Fitzsimmons, appellee

vs Appeal from McHenry.

William Cowan, et al

(Fred Siebel, appellant)

186 I.A. 358

Dibell, J.

On July 23, 1904, William Cowan and Maggie Cowan his wife, executed a promissory note for $2,500 and a trust deed to J. D. Donovan, securing said note, upon a lot in an addition to the city of Woodstock in McHenry County, which note became the property of M. H. Fitzsimmons and which was not paid, except certain interest and certain rents applied on the interest. On August 20, 1906, Cowan alone executed two promissory notes for $1,000 each to the McHenry County State Bank, one of which notes represented what he then owed the Bank and the other was to secure future advances the Bank might make him. He secured these notes by a second trust deed, upon the same real estate, which second trust deed was not executed by his wife, but was duly recorded on October 2, 1906. On November 18, 1907, Fred Siebel obtained a judgment against William and Maggie Cowan in a court of record in said county and had an execution within one year. On December 6, 1910 Fitzsimmons filed a bill to foreclose the first trust deed and made the Cowans and the Bank and Siebel and others defendants. The Bank was not served and Donovan was not made a party to the bill. There was a reference to the master and proofs and findings reported by him and a decree pursuant thereto. It found the amount due Fitzsimmons and directed a sale of the premises and the payment of said sum to complainant from the proceeds of the sale. The decree further directed that the master, out of the interest of

Ken. No. 5475

H. H. Titsworth, appellee

vs

William Gowen, et al

(Fred Stabel, appellant)

Appeal from McHenry.

186 I.A. 358

Tabell, J.

On July 22, 1904, William Gowen and Maggie Gowen his wife, executed a promissory note for $3,500 and a trust deed to J. P. Donovan, securing said note, upon a lot in addition to the city of Woodstock in McHenry County, which note became the property of H. H. Titsworth and which was not paid, except certain interest and certain rents applied on the interest. On August 20, 1904, Gowen alone executed his promissory note for $1,500 each to the McHenry County Trust Bank, one of which notes represented what he owed the Bank and the other was to secure future advances the Bank might make him. He secured these notes by a second trust deed, upon the same real estate, which second trust deed was not executed by his wife, but was duly recorded on September 2, 1908. On November 18, 1907, Fred Stabel obtained a judgment against William and Maggie Gowen in a court of record in said county and had in execution which was run. On December 8, 1910 Titsworth filed a bill to foreclose the first trust deed and made the Gowens and the Bank and Stabel and others defendants. The Bank was not served and Stabel was not made a party to the bill. There was a referring to the master and proofs for finding reported by the master before pursuant thereto. It found the amount due Titsworth and directed a sale of the premises and the payment of said sum to complainant from the proceeds of the sale. The master further directed that the master, and of an instrument of

William Cowan in the remainder of said proceeds, pay the Bank the sum found due it, "if he can determine such interest," and bring the balance into court. The master made his report of sale and of payment to Fitzsimmons in full and that he had in his hands $1,107.96 the balance of the proceeds of said sale, awaiting the further order of the court as to its distribution, as he was unable to determine the interest of said William Cowan in said real estate. On May 28, 1913 the court entered an order that said last named sum be paid by the master to the Bank "and thatit be accepted by said Bank subject to the inchoate right of dower which the defendant Maggie Cowan, may or might have in and to said sum," This is an appeal by Fred Siebel from that order.

It is contended that the original decree was erroneous because Donovan, the trustee, who held the title to the lands was not a party. To this there are several sufficient answers (1) This is not an appeal from the original decree. It is not a writ of error which would search the whole record. As no appeal was prosecuted from the original decree, it cannot be assailed on this appeal. (2) Although Donovan was not named as adefendant, he obtained leave to file an answer and filed an answer which began "The answer of J. D. Donovan, trustee and as President of the McHenry County State Bank." Complainant filed a replication to this answer. There is in this record no summons having a return showing service on the bank, but the certificate of the clerk to the record is not that this is a complete record, and there may have been such an answer on file, or the answer of Donovan may have been treated as the answer of the Bank. There are no irregularities of which Siebel can avail to defeat the original / decree.

William Cowan in the remainder of such proceeds, pay the bank the sum found due it, "if he can determine such interest," and bring the balance into court. The master made his report of sale and of payment to Fitzsimons in full and that he had in his hands $1,187.88 the balance of the proceeds of said sale, awaiting the further order of the court as to its distribution, as he was unable to ascertain the interest of said William Cowan in said real estate. On May 7, 1883 the court entered an order that said last named sum be held by the master to the Bank "and shall be subjected by said Bank subject to the inchoate right of dower which the defendant Maggie Cowan, may or might have in and to said sum." This is an appeal by Fred Stabel from that order.

It is contended that the original leases was wrongous because Donovan, the trustee, who held his title to the lands was not a party. To this there has been sufficient answer [1] This is not an appeal from the original decree. It is not a writ of error which would reverse the whole record. As no appeal was prosecuted from the original decree, it cannot be assailed on this appeal. (2) Although Donovan was not named as defendant, he obtained leave to file an answer [illegible] which been "the lessor of J. T. Donovan, trustee for [illegible] of the Mutual Trust Company." Defendant filed a replication to this answer. There is in this record no evidence having a return showing service on the bank, but the assistant [illegible] to the record is not that this is a material record, [illegible] such an answer on file, or the answer of Donovan [illegible] been treated as the lessor of J. T. Donovan. Without the [illegible] qualities of which Stabel can avail to [illegible] the original decree.

There is no averment or proof in this record as to what interests William Cowan and Maggie Cowan had in this lot. The premises may have been owned by William Cowan and the first trust deed may have been signed by Maggie Cowan merely to release her dower and homestead. It may have been owned by Maggie Cowan and signed by William Cowan merely to release his dower and homestead. They may have been each the owner of the undivided one-half. The bill alleges that when it was filed, they were not in possession, but tenants were. That might be true and yet they might not thereby have lost a homestead right. If the premises were homestead when the second trust deed was executed, then it did not give a lien on the homestead, being $1,000 of the value of the property, because it was not executed by the wife. Despain v Wagner 163 Ill. 598. Siebel in his answer stated that Cowan and his wife owned the premises. Taking this as true, as against Siebel, the appellant, the homestead right, if any, was cut off by the first mortgage, and the entire interest of the Cowans was properly ordered sold to pay the first trust deed. But before the residue could be applied, it was essential that the court further find and determine the rights of the parties. If the premises were not a homestead when the second trust deed was given and William Cowan owned the property in fee, then it would be right to pay the Bank. If the premises were not homestead and Maggie Cowan owned the fee, then the residue should have been applied on Siebel's execution. If Cowan and his wife each owned an undivided one-half of the premises, another result would be reached. Further proofs must be heard and the interests of the parties in the land, and therefore in the residue of the proceeds of the sale of the land, must

There is no evidence or proof in this record as to what interests William Cowan and Maggie Cowan had in the lot. The premises may have been owned by William Cowan and the first trust deed may have been signed by Maggie Cowan merely to release her dower and homestead. It may have been owned by Maggie Cowan and signed by William Cowan merely to release his dower and homestead. They may have been both the owner of the undivided one-half. The bill alleges that when it was filed, they were not in possession, but tenants were. That might be true and yet they might not thereby have lost a homestead right. If the premises were homestead when the second trust deed was executed, then it did not give a lien on the homestead, being $1,000 of the value of the property, because it was not executed by the wife. Deegan v Wagner 185 Ill. 308. Stated in the answer stated that Cowan and his wife owned the premises. Taking this as true, as against Bissel, the appellant, the homestead right, if any, was cut off by the first mortgage, and the entire interest of the Cowans was subject to the second to pay the first trust deed. But before the rights could be applied, it was essential that the court further find and determine the rights of the parties. If the premises were not a homestead when the second trust deed was given and William Cowan owned the property in fee, then it would be right to say the lien. If the premises were not homestead and Maggie Cowan owned the fee, then the rights should have been applied on Bissel's assertion. If Cowan and his wife each owned an undivided one-half of the premises, another result would be reached. Further proofs must be taken as to the interests of the parties in the land, and therefore in the residue of the proceeds of the sale of the land, with

be fixed by a supplemental decree before there can be an order for the payment of the residue of the money to any one.

The order of May 28, 1913 is therefore reversed and the cause is remanded to the court below for further proceedings in conformity with this opinion.

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be filed by a supplemental decree before there can be an order for the payment of the remainder of the money to any one.

The order of May 28, 1915 is therefore reversed and the cause is remanded to the court below for further proceedings in conformity with this opinion.

***

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5884.

Skilbeck and Brown, appellees

vs Appeal from Lake.

Hans Andreasen, appellant.

Dibell, J.

Appellees sued appellant before a justice to recover a bill which they claimed appellant owed them for lathing done by them for him upon a building containing eighteen flats. Appellant did not appear before the justice and appellees had judgment there for $63.85, the full amount of their claim. Upon a trial in the circuit court on appeal they had a verdict and a judgment for $50. from which defendant below appeals.

There were disputes in the testimony as to the terms upon which appelless did the work and as to the kind of work they did and as to the amount they did and as to whether or not the openings should be deducted in ascertaining the amount of lathing, and upon certain items of set off claimed by appellant. The jury have settled these controverted questions of fact and we see no reason for disturbing their conclusion approved by the trial judge.

Appellant contends that the court erred in rulings upon testimony. Appellant testified that he paid $7 to one Stewart to secure other men to do that part of the work not done by appellees. That was excluded. There was no testimony that it was necessary for him to hire Stewart to get other lathers to complete the work nor how much time Stewart spent in finding the lathers nor that $7 was a reasonable compensation for the service rendered by Stewart, and in the absence of any such testimony the ruling of the court was correct. Appellant testified that there were many places where appellee had not nailed the lathes, except in the

Nov. 24, 1924.

Hillbock and Crown, appellees

vs.

Appeal from Lake.

The Interest, appellant.

Mitchell, J.

Appellees and appellant joined issue in a suit to foreclose a bill which they claimed appellant owed them for building them or them for his work a building containing eighteen flats. Appellant did not answer before the justice, and appellees had judgment there for $65.85, the full amount of their claim. Upon a trial in the superior court on appeal they had a verdict and a judgment for $74, from which defendant has taken appeal.

There were disputes in the testimony as to the terms upon which appellees did the work and as to the kind of work they did and as to the amount they did. One of the matters on which the questions should be submitted to the jury was the question of lighting, and upon conflicting lines of the off evidence on that point. The jury have spoken these contradicted questions of fact and we see no reason for disturbing their conclusions reached by the trial judge.

Appellant contends that the court erred in ruling upon testimony. Appellant testified that he made it his interest to secure other men to do the work of the flats and those he employed. That was contested. There did not lightmay. Since it was necessary for him to give interest to other laborers to complete the work and for such also therefore in finding the interest more than it was a reasonable compensation for the private contract by themselves, in the absence of any such testimony the rights of the owner and interest. Appellant testified that there were two or three appellees had not worked the latter, which

center, and that he hired a man to go over the work and complete the nailing, and paid him $10 therefor. Appellant was then asked by his counsel if he knew what it was reasonably worth to have that nailing done. He answered "I don't know but that was as reasonable as it could be done." Appellant assumes that appellee's counsel moved to strike out the last part of that answer and that that motion was sustained by the court, leaving the answer to stand simply "I don't know", and he argues that that was error. The abstract so reads, but the record before us reads that appellee's motion was to strike out the first part of the answer and that that motion was granted. That left the answer to stand: "That was as reasonable as it could be done," and with that answer in the record, appellant was not harmed by an objection sustained by the court to the next question on the same subject. Moreover, said last objection was not sustained till after the question was answered and appellant did not ask to have the answer excluded. Moreover, there was other testimony that that charge was reasonable and it is quite possible that it was allowed in reducing appellees' claim from $63.85 to $50.

The trial judge asked certain questions of appellant's witnesses and it is argued that those questions were calculated to prejudice the jury against appellant's case. Appellant did not object to any of those questions. It is held in People v Abrams 249 Ill. 619 and in the cases there cited and in other cases in the supreme court, that if the trial judge propounds any improper question to a witness the party who may be injured thereby must by objection and exception preserve the same in the record if he desires to insist upon that as a ground for reversal. Section 81 of the Practice Act, as amended in 1911 does away with the necessity for

preserving an exception, but it is still the law that counsel considering themselves injured by such questions must object thereto and give the trial judge an opportunity to withdraw the objectionable question. These questions were not saved for review. The clerk will tax the additional abstract to the appellant.

The judgment is affirmed.

***

Whitney P. J. took no part.

preserving an exception, but it is still the law that counsel
contributing themselves injured by such questions must object
thereto and give the trial judge an opportunity to withdraw
the objectionable question. These questions were not raised
on review. The court will not consider additional objections
herein.

The judgment is affirmed.

Justice P. J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5898

Sam Clouston, appellee

vs Appeal from City Ct. Kewanee.

Galesburg & Kewanee Electric

Railway Co. appellant.

186 I.A. 375

Dibell, J.

Third street in the city of Kewanee runs east and west. Appellant operates a street car line in said street. Appellee owned a sprinkling wagon with which he sprinkled streets in the city. Lockery was in his employ driving and operating a sprinkling wagon drawn by two horses. A little before noon of August 15, 1911, Lockery drove said team and wagon south from an alley on to Third Street and drove west on Third Street about 65 feet and then turned south across the street railway track and then drove a short distance east, sprinkling Third Street. When he crossed the s street car track he noticed a street car a block and a half west, but he testified that he thought it was going the other way. The distance between the south rail of the street car track and certain telephone and other posts south of the travelled track in said street was not very great. The street car was in fact going east. There is a great difference in the testimony as to the speed at which it was running. The motorman, still in the employ of the company, testified that he was running 18 or 20 miles per hour. The street car struck some part of this water wagon and broke it and injured the horses. The owner sued the street car company for the injury to his property. At the first trial he had a verdict for $75 and he confessed a motion by the company for a new trial. At the second trial the jury disagreed. At the third trial he had a verdict and a judg-

ment for $300 from which the company appeals.

The verdict is moderate for the injuries inflicted upon appellee's property. The jury could hardly find otherwise from the evidence than that the motorman, in charge of the car, was negligent in its operation and was running it at a high and dangerous rate of speed and that by the exercise of due care he should have had it under such control as he approached this water wagon in front of him as not to have hit it. The only debateable question of fact is whether Lockery, the driver of the wagon, was in the exercise of due care. Upon that question the evidence was conflicting and a ~~xxxxxx~~ verdict either way might be sustained. He had a right to drive upon the street and if, as appellants evidence tends to show, he drew in towards the track, even that he had a right to do. Appellant's proof is that the motorman was sounding his gong. There is other evidence tending to show that it was not sounded. If Lockery thought the car was going the other way, he may have been entirely authorized to draw his team in nearer the track in order to sprinkle the center of the street where the track was. The jury might reasonably conclude that if the water wagon was slightly outside the line travelled by the street car yet ordinary care would cause a motorman to know that the wagon might come still closer and that he ought, in the exercise of due care, to reduce his speed, and that the driver of the wagon might reasonably expect that if any car came up behind him when he was so close to the track, it would be under control. The jury have found that Lockery was exercising due care and the trial judge has approved that conclusion. We cannot say that the decision of that question of fact should have been the other way.

Appellant argues that the court erred in permitting

Lockery to describe his injuries. It was competent as tending to show the speed with which the car was driven when it struck the wagon. But, if this is not so, other witnesses testified to the injuries to Lockery without objection. He was rendered unconscious. Some of appellant's witnesses testified to the same fact. The fact was abundantly proved by testimony to which no objection was made. Numerous instructions were given for each party and appellant contends that those given for appellee are nearly all erroneous. Some of those given for appellee are not perfect in form, but we conclude that they did not mislead the jury and that the jury were properly and sufficiently instructed as a whole. The propositions of law bearing on the case were very few and were correctly stated.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

186 A 474

919

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Clitcher

vs.

No. 11

October Term, 1913.

Est. James Alsup

~~ERROR TO~~
APPEAL FROM

186 I.A. 474

Circuit COURT

Pope COUNTY

TRIAL JUDGE

Hon. W. M. Brewster

Term No. 11. Agenda No. 21.

October Term, A. D. 1913.

M. J. Cletcher, Appellant, vs. Estate of James L. Alsup, Deceased, Appellee.	Appeal from the Circuit Court of Pope County.

186 I.A. 474

McBride, P.J.

This was a suit by appellant to collect a note from the estate of James L. Alsup, Appellee. A jury was waived and a trial had before the Judge, who, after hearing the evidence, found in favor of the estate and rendered judgment against the appellant for costs, from which judgment she prosecutes this appeal.

The only question made and argued in this court is, that the finding of the Circuit Court was against the weight of the evidence. It was sought by the appellant to recover upon the following note:

Ten Hundred Dollars. Aug. 15, 1911.

> One day after date I promise to pay to M. J. Cletcher or order, ten hundred dollars, for value received of her with 7 per cent interest from date.
>
> James L. Alsup.

The note was written upon plain thin paper and bears evidence of erasures in several places, and it is admitted by appellant that erasures were made, and the note was changed from a note of fifty-one dollars to a note of ten hundred dollars but she claims that the change was made before the note was signed by the deceased James L. Alsup. Her incompetency as a witness was waived in part and she was permitted to testify "so far as her evidence will tend to explain such alterations and

Term No. 11. Agenda No. 22.

October Term, A. D. 1913.

E. J. Chatmer, Appellant,	
vs.	Appeal from the Circuit Court of Pope County.
Estate of James L. Alsup, Deceased, Appellee.	

186 I.A. 474

MCBRIDE, J.

This was a suit by appellant to collect a note from the estate of James L. Alsup, Appellee. A jury was waived and a trial had before the judge, who, after hearing the evidence, found in favor of the estate and rendered judgment against the appellant for costs, from which judgment she prosecutes this appeal.

The only question made and argued in this court is, that the finding of the Circuit Court was against the weight of the evidence. It was sought by the appellant to recover upon the following note:

Ten Hundred Dollars. Aug. 24, 1911.

One day after date I promise to pay to E. J. Chatmer or order, ten hundred dollars, for value received of her with 7 per cent interest from date.

James L. Alsup.

The note was written upon plain thin paper and bears evidence of erasures in several places, and it is admitted by appellant that erasures were made, and the note was changed from a note of fifty-one dollars to a note of ten hundred dollars but she claims that the change was made before the note was signed by the deceased James L. Alsup. Her incompetency as a witness was waived in part and she was permitted to testify "as far as her evidence will tend to explain such alterations and

interlineations." She claims that the deceased came to her and wanted to borrow one thousand dollars and that she told him she could get it from her brother W. M. Barton. She claims that she did get the one thousand dollars from Barton, in money, and proved by Barton that he let her have one thousand dollars in money; and she further claims that at the time she let the deceased Alsup have the one thousand dollars he agreed to pay her fifty dollars commission and one dollar car fare, and that she wrote out a note for the deceased to sign for the fifty-one dollars and that after the note was written out, or nearly so, that the deceased said to her that he would just give her thirty dollars in cash and not make that note; that she agreed to this and that she then changed the note from fifty-one dollars to ten hundred dollars, the amount that she claims to have loaned him, and that he then signed it. It appears from the evidence that as she first wrote out the note for fift -one dollars it was made payable to her husband M. C. Cletcher; she then changed the M.C. to M. J. the fifty-one dollars to ten hundred dollars and changed the word "him" to "her", and it also appears from the evidence that she changed the date of the note. She says she does not know whether she changed the date or not but the evidence of other witnesses shows that the date was changed. It is conceded that the signature to the note is the genuine signature of the deceased James L. Alsup, and some of the witnesses testify that there are at least three different handwritings appearing upon the face of this note. It is true that the claimant proved by the witness Upton that the deceased wantedto borrow some money from him and that he could not loan it to him and Alsup then said he was going to see if he could get it from Mr. or Mrs. Cletcher, and that the deceased afterwards told the witness that Mrs.Cletcher had promised it to him. There is some further evidence that

interlineations." She claims that the deceased came to her and wanted to borrow one thousand dollars and that she told him she could get it from her brother W. W. Barton. She claims that she did get the one thousand dollars from Barton, in money, and proved by Barton that he let her have one thousand dollars in money; and she further claims that at the time she let the deceased Alsup have the one thousand dollars he agreed to pay her fifty dollars commission and one dollar car fare, and that she wrote out a note for the deceased to sign for the fifty-one dollars and that after the note was written out, or nearly so, that the deceased said to her that he would just give her thirty dollars in cash and not make that note; that she agreed to this and that she then changed the note from fifty-one dollars to ten hundred dollars, the amount that she claims to have loaned him, and that he then signed it. It appears from the evidence that as she first wrote out the note for fifty-one dollars it was made payable to her husband W. W. Dietzhner; she then changed the W.W. to M.L. the fifty-one dollars to ten hundred dollars and changed the word "him" to "her", and it also appears from the evidence that she changed the date of the note. She says she does not know whether she changed the date or not but the evidence of other witnesses shows that the date was changed. It is conceded that the signature to the note is the genuine signature of the deceased James L. Alsup, and some of the witnesses testify that there are at least three different handwritings appearing upon the face of this note. It is true that the claimant proved by the witness Upton that the deceased wanted to borrow some money from him and that he could not loan it to him and Alsup then said he was going to see if he could get it from Mr. or Mrs. Dietzhner, and that the deceased afterwards told the witness that Mrs. Dietzhner had promised it to him. There is some further evidence that

(2)

tends in some degree to corroborate the testimony of the claimant but none of it is conclusive or could be made so without the aid of her testimony, and her incompetency was only waived as to such matters as tend to explain the erasures and interlineations in the note. The testimony of appellee, in addition to that already mentioned, tended to show that some time prior to this the deceased had given a note to S. C. Cletcher, her husband, for the amount of fifty-one dollars; that deceased had paid off this note but the note had not been returned to him and that Alsup went one day and inquired about the note and wanted it returned and the appellee looked for it but was not able to find it. And it is further claimed by the appellee that this fifty-one dollar note that had been paid off was the note out of which the ten hundred dollar note in question was made, and that this fifty-one dollar note which bore the genuine signature of the deceased Alsup was used as a basis upon which to form the ten hundred dollar note because it had his signature. It is admitted by the appellant that she changed the fifty-one dollars in the corner of the note to ten hundred dollars, and that the amount was changed in the body of the note, and the evidence further shows that the words "or order" were inserted in the note and the date changed and the letters "S. C." erased and "M.J." inserted. We are inclined to think that it is at least passing strange that she would go to the trouble of making all of these erasures and interlineations upon this paper, as she did, rather than write out a new note which could have been done with much less trouble. There are also some other facts and circumstances tending to corroborate appellee's theory of this case but there is one circumstance testified to by the experts, that the date of the note was changed, which is not denied but she says in her testimony, she does not know whether she changed the date of the note or not. If the note was written upon August 15th, as she

handwriting were degree to corroborate the testimony of the claimant but none of it is conclusive or could be made so without the aid of her testimony, and her incompetency was only waived as to such matters as tend to explain the erasures and interlineations in the note. The testimony of appellee, in addition to that already mentioned, tended to show that some time prior to this the deceased had given a note to S. C. Clothier, her husband, for the amount of fifty dollars; that Hesitant had paid off this note but the note had been returned to him and that Alsup went one day and inquired about the note and wanted it returned and the appellee lowed for it but was not able to find it. And it is further claimed by the appellee that this fifty-one dollar note that had been paid off was the note out of which the ten hundred dollar note in question was made, and that this fifty-one dollar note which bore the genuine signature of the deceased Alsup was used as a basis upon which to form the ten hundred dollar note because it had its signature. It is admitted by the appellant that she changed the fifty-one dollars in the corner of the note to ten hundred dollars, and that the amount was changed in the body of the note, and the evidence further shows that the words "or order" were inserted in the note and the date changed and the letters "S. C." erased and "A.L." inserted. We are inclined to think that it is at least passing strange that she would go to the trouble of making all of these erasures and interlineations upon this paper, as she did, rather than write out a new note which could have been done with much less trouble. There are also some other facts and circumstances tending to corroborate appellee's theory of this case but there is one circumstance testified to by the experts, that the date of the note was changed, which is not denied but she now in her testimony, she does not know whether she changed the date of the note or not. If the note was written upon August 15th, as she

claimed, for fifty-one dollars and then changed from fifty-one dollars to ten hundred dollars, why was there any necessity for changing the date of the note? No explanation is made and it seems to us without some explanation that it is unreasonable; but it would be perfectly reasonable that if the old note were used as a basis and it bore a different date, that it would have to be changed to correspond with the date of the transaction. It seems to us that when a note bearing so many unreasonable erasures, which could have been easily avoided, and changing a note from the small amount of fifty-one dollars to ten hundred dollars were made, and no explanation given as to why a new note was not prepared, that it requires very close scrutiny upon the part of the court before allowing a claim ~~for~~ of this character against an estate.

The appellant and appellee each upon their own theory of this case presented the evidence and the trial judge who saw the witnesses upon the stand heard their testimony, viewed their demeanor, was much more able to determine who was telling the truth about this matter than we can from the record. This was purely a question of fact to be determined by the Judge and in the determination of a question of fact he stands in precisely the same attitude as a jury, in that respect, and his findings and conclusions are to be given the same weight as those of a jury upon a question of fact. Simms vs. Kuykendall, 85 Ill., 476; Conrad vs. Kloepfer, 33 App., 228.

We cannot say from this record that the finding of the trial Court was manifestly against the weight of the evidence, and unless we do so find we have no right to disturb the judgment and finding of the trial Court. We are, however, of the opinion that the trial Court was fully warranted in its finding in this matter and that he committed no error in rendering judgment against the appellant, and the judgment of the lower Court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

claimed, for fifty-one dollars and then changed from fifty-one dollars to ten hundred dollars, why was there any necessity for changing the date of the note? No explanation is made and it seems to us without some explanation that it is unreasonable; but it would be perfectly reasonable that if the old note were used as a basis and it bore a different date, that it would have to be changed to correspond with the date of the transaction. It seems to us that when a note bearing so many unusual features, which would have been easily avoided, and giving a note from the small amount of fifty-one dollars to ten hundred dollars were made, and no explanation given as to why a new note was not prepared, that it requires very close scrutiny upon the part of the court before allowing a claim for of this character against an estate.

The appellant and appellee each upon their own theory of this case presented the evidence and the trial judge who saw the witnesses upon the stand heard their testimony, viewed their demeanor, was much more able to determine who was telling the truth about this matter than we can from the record. This was merely a question of fact to be determined by the judge and in the determination of a question of fact he stands in precisely the same attitude as a jury. In that respect, and his findings and conclusions are to be given the same weight as those of a jury upon a question of fact. Ulmer vs. Dunkelsbl, 23 Ill., 333; Conrad vs. Eisenlar, 22 Ibn., 99.

We cannot say from this record that the finding of the trial Court was manifestly against the weight of the evidence, and unless we do so find we have no right to disturb the judgment and finding of the trial Court. We are, however, of the opinion that the trial Court was fully warranted in its finding in this matter and that he committed no error in rendering judgment against the appellant, and the judgment of the lower court is affirmed.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 506

985

pinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday month of March in the year of our Lord, one thousand nine hundred and fourteen, the same be- e 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

W. S. PAYNE, Sheriff.

A. C. MILLSPAUGH, Clerk.

And afterwards in Vacation, after said March term, to-wit: On the 1st day May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an INION in the words and figures following:

Clay

vs.

No. 40

October Term, 1913.

I & R Co

~~ERROR TO~~
APPEAL FROM

186 I.A. 506

City COURT

E St Louis ~~COUNTY~~

TRIAL JUDGE

Hon. W M Vandeventer

Term No. 40. Agenda No. 24.

October Term, 1913.

Roger J. Clay, Appellee, vs. Aluminum Ore Company, Appellant.	Appeal from the City Court of East St. Louis.

186 I.A. 506

McBride, P.J.

The appellee recovered a judgment of three thousand dollars in the City Court of East St. Louis, Illinois, to reverse which judgment this appeal is prosecuted.

It appears from the record in thiscase that on and prior to the 8th day of October, 1910, the appellant was engaged in building a structure in its plant erected for the preparation of aluminum ore, which building was being constructed of iron and brick. The roof rested on the brick walls and there were iron braces from one brick wall to the other to support the roof and on the top of the brick work were placed triangular pieces of iron which joined together in the center of the building and when riveted together constituted a support or rafters for the roof. While riveting, boards were placed from one truss to another upon which the riveting gang would stand while performing their work. Appellee began work for the appellant four or five weeks prior to the time of his injury and had, for the most part of the time, been engaged as carpenter, mill-wright, helper and operating an elevator. He had not been engaged with the riveting gang for more than four or five days. He first began his work with the riveting gang under a man by the name of Dan Ryan who, as appellee claimed, was acting in the capacity of foreman of the gang. Shortly after appellee began this work Ryan was removed and a man by the name of Cavanaugh was

Term No. 40. Agenda No. 84.

October Term, 1913.

Roger J. Clay, Appellee, vs. Aluminum Ore Company, Appellant.	Appeal from the City Court of East St. Louis.

McBride, P.J.

The appellee recovered a judgment of three thousand dollars in the City Court of East St. Louis, Illinois, to reverse which judgment this appeal is prosecuted.

It appears from the record in this cause that on and prior to the 8th day of October, 1910, the appellant was engaged in building a structure in its plant erected for the manufacture of aluminum ore, which building was being constructed of iron and brick. The roof rested on the brick walls and there were iron braces from one brick wall to the other to support the roof and on the top of the brick were placed triangular pieces of iron which joined together in the center of the building and when riveted together constituted a support or rafters for the roof. While riveting, boards were placed from one truss to another upon which the riveting gang would stand while performing their work. Appellee began work for the appellant four or five weeks prior to the time of his injury and had, for the most part of the time, been engaged as carpenter, mill-wright, helper and operating an elevator. He had not been engaged with the riveting gang for more than four or five days. He first began his work with the riveting gang under a man by the name of Dan Ryan who, as appellee claimed, was acting in the capacity of foreman of the gang. Shortly after appellee began this work Ryan was removed and a man by the name of Lawrence was

put in his place who had supervision of the riveting gang, which consisted, at the time of the accident and for some days prior thereto, of Cavanaugh, Reeder, Stieger and appellee. Stieger and appellee while performing their work would stand upon boards laid from one truss to another and above them and on the opposite side of the iron being riveted was Cavanaugh, and Reeder was below them. Reeder would heat the rivets and pitch them up to Stieger who caught them in a bucket, Stieger would place the rivets in the hole, appellee would then place a buck-bar which he held, and was used to hold the rived in place, against the rivet while the other end of the rivet was flattened out by Cavanaugh with an air gun. There were several gangs of men engaged in performing the same character of work who were under the general supervision of Joe Feist as construction foreman of appellant. Feist in his examination says that he did not have a special foreman under him but that he would have one of the leading iron workers of the gang, some old man that he knew was all right, to break in the new ones and tell them what to do, and when they don't obey the leader he would come to me and I would adjust the difficulty. Cavanaugh was the leader of this gang and I told appellee to get his instructions from Cavanaugh as to bucking up rivets, etc. Appellant furnished the lumber for the riveting gang to use in constructing platforms upon which to stand but the lumber appears to have been scattered about over or near the building and when the men desired lumber some of the four engaged in the riveting would go out and get the necessary lumber, and sometimes all of them would go. When a piece was selected, by any of the men, Cavanaugh did not like or think proper to be used in the building of the platforms he would reject it. When this riveting gang of which Cavanaugh is claimed to have had charge and control of came to drive the rivets at the place where the

put in his place who had supervision of the riveting gang, which consisted, at the time of the incident and for some days prior thereto, of Cavanough, leader, Stinger and appellee. Stinger and appellee while performing their work would stand upon boards laid from one trusse to another and above them and on the opposite side of the iron being riveted was Cavanough, and leader was below them. Leader would heat the rivets and pitch them up to Stinger who caught them in a bucket, Stinger would place the rivets in the hole, appellee would then place a buck-bar which he held, and was used to hold the rivet in place, against the rivet while the other end of the rivet was flattened out by Cavanough with an air gun. There were several gangs of men engaged in performing the same character of work who were under the general supervision of the foreman construction foreman of appellant. Point in his examination says that he did not have a special foreman under him but that he would have one of the leading iron workers of the gang, some old man that he knew was all right, to break in the new ones and tell them what to do, and when they don't obey the leader he would have to do and I would relieve the difficulty. Cavanough was the leader of this gang and I told appellee to get his instructions from Cavanough as to bucking up rivets, etc. Appellant furnished the lumber for the riveting gang to use in constructing platforms upon which to stand but the lumber appears to have been scattered about over or near the building and when the men desired lumber of the four engaged in the riveting would go out and get the necessary lumber, and sometimes all of them would go. When a piece was selected, by any of the men, Cavanough did not like or think proper to be used in the building of the platforms he would reject it. When this riveting gang of which Cavanough is claimed to have had charge and control of came to drive the rivets at the place where the

injury happened they built a platform upon which Stieger stood but there was a platform or board extending from one truss to another at the appropriate place for appellee to stand and perform his work. The evidence tends to show that when it was discovered that this board was in a right position for appellee's use that Cavanaugh directed appellee and Stieger to step out on to the board and see if it was strong enough, which they did, and appearing to be strong enough he directed appellee to use this board to stand upon while flattening the rivets, which appellee did, and after working a few minutes at driving the rivets appellee's buck bar slipped on the rivet and thereby extra pressure was thrown on the board and it broke and threw appellee to the ground a distance of twenty-six or twenty-seven feet and injured him. It was then learned that there was a knot on the lower side of the board at the place where it broke, which extended across and a considerable distance into the board and weakened it which ~~xxx~~ caused the board to break. It is claimed by appellee that Cavanaugh was the foreman and that it was his duty to have inspected the board and that by proper inspection he could have ascertained that the board was weak and unfit for a platform; while, on the other hand, it is contended by appellant that Cavanaugh was only a fellow servant and that no greater duties of inspection devolved upon him than upon appellee and that as appellee had gone out on the board before using it and tested it, and had used this board without being authorized so to do that he assumed the risk and that no liability for the accident attached to the appellant.

The first count of plaintiff's declaration, omitting the formal parts, alleges, "That the defendant negligently and carelessly furnished for the plaintiff to stand on while performing his duties, certain planks which were weak, defective and uncertain for the purposefor which they were used and which weak and

injury happened they built a platform upon which Stieger stood but there was a platform or board extending from one trees to another at the appropriate place for appellee to stand and perform his work. The evidence tends to show that when it was discovered that this board was in a right position for appellee's use that Cavanaugh directed appellee and Stieger to step out on to the board and see if it was strong enough, which they did, and appearing to be strong enough he directed appellee to use this board to stand on while tightening the rivets, which appellee did, and after tighting a few rivets as driving the rivets appellee's hook bar slipped on the rivet and thereby extra pressure was thrown on the board and it broke and threw appellee to the ground a distance of twenty-six or twenty-seven feet and injured him. It was then learned that there was a knot on the lower side of the board at the place where it broke, which extended across and a considerable distance into the board and weakens it which was caused the board to break. It is claimed by appellee that Cavanaugh was the foreman and that it was his duty to have inspected the board and that his proper inspection he could have ascertained that the board was weak and unfit for a platform; while, on the other hand, it is contended by appellees that Cavanaugh was only a fellow servant and that no greater duties of inspection devolved upon him than upon appellee and that as appellee had gone out on the board before using it and tested it, and had used this board without being authorized so to do that he assumed the risk and that no liability for the accident attached to the appellant.

The first count of plaintiff's declaration, omitting the formal parts, alleges, "That the defendant negligently and carelessly furnished for the plaintiff to stand on while performing his duties, certain planks which were weak, defective and unsafe for the purposes which they were used and which were

defective condition of such planks was known to the defendant or could have been known by the exercise of ordinary care but was unknown to the plaintiff and could not have been discovered by him in the exercise of ordinary care."

It further avers that while standing upon one of the planks so furnished in the performance of his duties, and while in the exercise of ordinary care for his own safety the plank broke and permanently injured appellee. The second alleges that plaintiff while engaged in assisting and riveting and fastening together certain pieces of metal used in the formation of such building that the work in which he was then engaged required him to stand upon a certain scaffold furnished by the defendant and avers that under the statute then in force, which provided for the protection and safety of persons engaged in and about the construction, repairing, altering or removal of buildings, bridges, viaducts and other structures that it was the duty of defendant to erect and construct said scaffold so as to give proper and adequate protection of life and limb of any person employed or engaged thereon. That the defendant did not so erect and construct the scaffold upon which appellee was required to perform his duties but that it was weak, defective and insufficient, and while in the exercise of due care for his own safety the plank upon which he stood broke in two and he was hurled to the ground and injured. This count does not charge wilful negligence upon the part of the appellant.

At common law it became the duty of appellant to furnish appellee with a reasonably safe place in which to perfom his work. T he question now under consideration is, did it do this? The appellant contends that the place upon which appellee was engaged at work was not furnished by it; that it furnished appellee and his associates with suitable and proper material with which to erect a platform upon which to perfom the work and that

defective condition of such planks was known to the defendant or could have been known by the exercise of ordinary care but was unknown to the plaintiff and could not have been discovered by him in the exercise of ordinary care."

It further avers that while standing upon one of the planks so furnished in the performance of his duties, and while in the exercise of ordinary care for his safety he plaintiff was severely and permanently injured appellee. The second alleges that plaintiff while engaged in assisting and riveting and tacking together certain pieces of metal used in the formation of such building that the work in which he was then engaged required him to stand upon a certain scaffold furnished by the defendant and avers that under the statute then in force, which provided for the protection and safety of persons engaged in and about the construction, repairing, altering or removal of buildings, bridges, viaducts and other structures that it was the duty of defendant to erect and construct said scaffold so as to give proper and adequate protection of life and limb of any person employed or engaged therein. That the defendant did not in erecting and construct the scaffold upon which appellee was required to perform his duties but that it was negligently, carelessly and insufficient, and while in the exercise of due care for his own safety the plank upon which he stood broke in two and he was hurled to the ground and injured. This count does not charge willful negligence upon the part of the appellant.

At common law it became the duty of appellant to furnish appellee with a reasonably safe place in which to perform his work. The question now under consideration is, did it do this? The evidence contends that the place were appellee was engaged at work was not furnished by it; that it furnished appellee and his associates with scaffolds and another material etc which he erect a platform upon which to perform the work and that

it was their duty to construct a platform out of the material so furnished; that they failed to do this but chose to use other material that was not safe, which had been prepared and used by some one else for some other purpose and by so doing avoided the labor of constructing a platform. Appellee contends that he had nothing to do with determining how or when a platform should be built; that the determination to erect a platform, its manner of construction, etc., were all left to the discretion of the foreman Cavanaugh; that the platform used had been built by some other of appellant's employes and used on some other occasion and for some other purpose and that as it was at the place required for the use of appellee the foreman determined to adopt it for present use and that appellee was directed by him to use this platform. Appellee further claims that Cavanaugh was a vice principal and had the power to designate what should and should not be used. That the platform so designated by him to be used was weak, defective and unsafe and that he was negligent in furnishing a platform of this character; that the lower side of the board was knotty and defective, that the defect was not open to observation by appellee, that Cavanaugh was negligent in not properly inspecting the board before directing its use. This proposition depends upon the relation that Cavanaugh sustained to appellee. If he was a vice principal then it was his duty to properly inspect the place or platform before directing his men to use it. "The duty to exercise reasonable care to see that the place furnished for the servant to work is reasonably safe is a positive obligation towards a servant and the master is responsible for any failure to discharge that duty, whether he undertakes that performance personally or through another servant. The master cannot divest himself of such duty, and he is responsible as for his own personal negligence for a want of proper caution on the part of his agent." Ness vs. Rosenthal, 160 Ill., 621.

it was their duty to construct a platform out of the material so furnished; that they failed to do this but chose to use other material that was not safe, which the defendants knew; and by some one else for some other purpose and by so doing violated the laws of workmanship and practice. Appellee contends that he had nothing to do with determining how or when a platform should be built; that the determination to erect a platform, its manner of construction, etc., were all left to the discretion of the foreman Cavanaugh; that the platform used had been built by some other of appellant's employes and used on some other occasion and for some other purpose and that as it was at the place required for the use of appellee the foreman determined to adopt it for present use and that appellee was directed by him to use this platform. Appellee further claims that Cavanaugh was a vice principal and had the power to disregard what should and should not be used. That the platform so designated by him to be used was weak, defective and unsafe and that he was negligent in furnishing a platform of this character; that the lower side of the board was rotty and defective; that the defect was not open to observation by appellee; that Cavanaugh was negligent in not properly inspecting the board before directing its use. This proposition depends upon the relation that Cavanaugh sustained to appellee. If he was a vice principal then it was his duty to properly inspect the place or platform before directing his man to use it. "The duty to exercise reasonable care to see that the place furnished for the servant to work in reasonably safe is a positive obligation to which a servant and the master is responsible for any failure to discharge that duty, whether he undertakes that performance personally or through another servant. The master cannot divest himself of such duty, and he is responsible as for his own personal negligence for a work of proper equipment or the work done by his agent." Ibes vs. Lumsden, 140 Ill., 401.

It appears from the evidence that Cavanaugh, Stieger, Reed and appellee were all engaged together in performing this work of riveting but the fact that Cavanaugh was engaged at work with the other men would not prevent him from being a vice-principal in directing and determing the proper and necessary things to do in making preparations to perform the work. Metropolitan West Side Elevated R. R. Co. vs. Skola, 183 Ill., 454. Chenoweth vs. Burr, 242 Ill., 312. We are of the opinion that the question as to whether or not Cavanaugh, under the evidence in this record, was a vice-principal and clothed with the authority to determine what should and what should not be used in the construction of a platform, its manner of construction, etc., was a question of fact for the jury to determine. Appellee says, "Mr. Cavanaugh went with us when we went to get the boards and would tell us which ones to get." In speaking of the board upon which appellee stood at the time of the injury he says, "Cavanaugh said the board was right where we needed it and said lets get to work. Mr. Stieger and myself got on the board." "Mr. Cavanaugh directed how these scaffolds were to be made; Cavanaugh determined what boards to use." "Cavanaugh said, here is a board right here where we need it, no use throwing it down and put another one in here; he said, we'l proceed." William Reeder, another of appellee's witnesses testified, that, "Cavanaugh told us what to do." "We would draw the boards up with ropes and lay them on the iron work. Cavanaugh would tell us which boards to take and where to place them. Cavanaugh was giving me instructions." Again he says, "He told us what to do, where to stand and where to put our rivets. Cavanaugh would come along with us and we would just get a board wherever we could find it, outside the plant or upon the iron work or any place. Sometimes Cavanaugh would say to take a certain board but ordinarily when the four of us went out to find boards any of us would take a board that we thought was all right. He generally

It appears from the evidence that Carnaugh, Gidney, Ward and Appelle were all engaged together in performing this work of riveting but the fact that Cavanough was employed at work with the other men would not prevent him from being a vice-principal in directing and detailing the proper and necessary things to do in making preparations to perform the work. Certainly Ward was the director. Q. Do you, Gidney, put this question to Carnaugh? Ans. Yes, Sir. Q. Do you put the question to Ward? Ans. Yes, Sir. Q. Do you put the question to another or not Cavanough, under the evidence in this record, was a vice-principal and clothed with the authority to determine what should and what should not be done in the construction of a platform, its manner of construction, etc., was a question of fact for the jury to determine. Question ends. "Mr. Cavanough went with us when we went to get the boards and would tell us which ones to get." In speaking of the board upon which Appelle stood at the time of the injury he says, "Cavanough said the board was right where we needed it and said let's get to work. Mr. Stieger and myself got on the board." "Mr. Cavanough directed how these scaffolds were to be made; Cavanough determined what boards to use." "Cavanough said, here is a board right here which we need it, so we started in then and put another one in here; he said, well proceed." William Ledger, another of appellee's witnesses testified, thus: "Cavanough told us what to do." "We would draw the boards up with rope and lay them on the iron work. Cavanough would tell us which boards to take and where to place them. Cavanough was giving me instructions." Again he says, "He told us what to do, where to stand and where to put our rivets. Cavanough would come along with us and we would just set a board wherever we could find it, outside the plant or upon the iron work or any place. Sometimes Cavanough would say to take a particular board but mostly when the four of us went out to find four of us would take a board that we thought was all right. In generally

told us three fellows what to do. We were new men. He told us what to do, where to stand and where to put our rivets." Another witness, Henry Stieger says, "We were working under Cavanaugh's instructions. Besides that he was driving rivets; I was sticking in rivets and Clay was bucking up rivets. On that morning we found a board there in a position to be used by the workmen; we decided to go out on the board. Clay and I walked out and tried it; I said to Cavanaugh that we might as well try it before wego to work on it. He said for us to go out and try it and see if it is all right. Then Clay and I walked out on it; we started out with some 4 x 4; Cavanaugh decided that was too slow work and we commenced using some 2 x 8 and 2 x 10. Cavanaugh directed us to use that kind of boards." "Cavanaugh would not go with us all the time but if he saw a board was no good he would tell us about it. At this particular time he told Clay and I to go out on the board and see if it was all right. That is why we went out on the board first. We made the test and concluded it was all right." Joe Feist, the general foreman of appellant said, "I was foreman over all the men in the building. There were about thirty of them. I didn't have a special foreman under me. We would leave one of the leading iron workers there to look after it; some old man that we knew was all right to break the new ones in. We always have an old man we always keep there and on any job we start we always put an old man there to break the new men in because new men have to be broke in. Then the men don't obey what the leader tells them the man comes to me and I adjust it myself. Clay was a new man in this line of business. He was there when I gave instructions. All four of them were there and heard what I wanted done. I gave instructions to Clay to get his instructions from Cavanaugh, the driver, as to bucking up rivets, etc." The testimony above referred to is practically uncontradicted. The

told us those fellows what to do. We were are sure. He told us what to do, where to stand and where to put our rivets." Another witness, Henry Wagner said, "We were receiving some Cavanaugh's instructions. Besides that he was driving rivets; I was sticking in rivets and Clay was bucking up rivets. On that morning we found a board in a position to be used by the workmen; we decided to go out on the board. Clay and I walked out and tried it: I said to Cavanaugh that we might as well try it before weps to work on it. He said for us to go out and try it and see if it is all right. Then Clay and I walked out on it; we started out with some 4 x 4; Cavanaugh decided that was too slow work and we commenced using some 2 x 8 and 2 x 12. Cavanaugh directed us to use that kind of boards." Cavanaugh could not go with us all the time but if he saw a board was good he would tell us about it. At this particular time he told Clay and I to go out on the board and see if it was all right. That is why we went out on the board first. We made the test and concluded it was all right." Joe Yates, the president of the company of appellant said, "I was foreman over all the men in the building. There were about thirty of them. I didn't have a special foreman under me. We would leave one of the leading iron workers there to look after it; some old man that we knew was all right to break the new ones in. We always have an old man we always keep there and on any job we start we always put an old man there to break the new men in because our men have to be broke in. When the men don't obey what the leader tells them the man comes to me and I adjust it myself. Clay was a new man in this line of business. He was there when I gave instructions. All four of them were there and heard what I wanted done. I gave instructions to Clay to get his instructions from Cavanaugh, the driver, as to bucking up rivets, etc." The testimony above referred to is practically uncontradicted. The

foreman, Cavanaugh, was not placed upon the witness stand, and while it is true that Feist denied that Cavanaugh had any authority over either of the other men, other than to say when he wanted rivets, and that all four of the men had equal rights as to the boards for scaffolds, we are of the opinion that the jury were warranted in determining that Cavanaugh had and exercised more authority in this matter than Feist was willing to acknowledge when upon the witness stand. The question of Cavanaugh's authority was submitted to the jury under the instructions of the court, and the jury of necessity found that he had the authority to determine how, and the manner in which these platforms should be constructed for the use of the men and we cannot say that the finding of the jury in this respect was manifestly against the weight of the evidence. "The determination of one in charge of work is the determination of the master." Metropolitan West Side Elevated R. R. Co. vs. Skola(Supra).

Counsel for appellant also insist that appellant did not furnish the platform upon which appellee stood at the time he fell. We think this question depends entirely upon the relation of Cavanaugh, and if Cavanaugh was a vice principal as has been determined by the jury, then under the evidence, he furnished and directed that this particular plank should be used by appellee in the performance of his work. If Cavanaugh was the representative of the master then his determining to use the board in place as a scaffold would to all intents and purposes be a furnishing thereof by the master.

In the view we take of the finding of the jury as to the finding of facts in this case we deem it unnecessary to determine whether or not the second count of plaintiff's declaration was valid as a statutory count by reason of having neglected to allege that the negligence of appellant was wilful.

It is insisted that the court erred in overruling the ob-

foreman, Cavanaugh, was not placed upon the witness stand, and while it is true that Yeats denied that Cavanaugh had any authority over either of the other men, other than to say when he wanted rivets, and that all four of the men had equal rights as to the boards for scaffolds, we are of the opinion that the jury were warranted in determining that Cavanaugh had and exercised more authority in this matter than the mere willing acknowledge when upon the witness stand. The question of Cavanaugh's authority was submitted to the jury under the instructions of the court, and the jury of necessity found that he had the authority to determine how, and the manner in which these platforms should be constructed for the use of the men and we cannot say that the finding of the jury in this respect was manifestly against the weight of the evidence. "The determination of one in charge of work is the determination of the master." Metropolitan West Side Elevated R. R. Co. vs. Thola(supra).

Counsel for appellant also insist that appellant did not furnish the platform upon which appellee stood at the time of the fall. We think this question depends entirely upon the relation of Cavanaugh, and if Cavanaugh was a vice principal or has been determined by the jury, then under the evidence, we are inclined and directed that this particular point should be used by appellee in the performance of his work. If Cavanaugh was the representative of the master then in determining to use the board in place as a scaffold would be all that plaintiff was required to do, furnishing therewith by the master.

In the view we take of the finding of the jury as to the finding of facts in this case we deem it unnecessary to determine whether or not the second count of plaintiff's declaration was valid as a statutory count by reason of having neglected to allege that the negligence of appellant was willful.

It is insisted that the court erred in overruling the motion

jections of counsel for appellant to the following question: "Who had charge of that immediate work, if anybody, of riviting the pieces together?" And other questions of like import and pertaining to the riveting of the pieces together. It is insisted that the answer to this question calls for a conclusion, and while it is of that character of question yet it was afterwards fully explainedwhat part Cavanaugh actually took in this matter. It will be noted that the question here called upon the witness to tell who had charge of the riveting of the pieces together. There was no question about this matter, and as we read this evidence appellant in its testimony took the position, and showed as far as they could, that Cavanaugh was in charge of the riveting of the pieces together. We do not think this, under the state of the record, is error.

Counsel also criticise the admission of the photograph in evidence because it was not sufficiently identified. While it was not identified by the person who actually made the photograph, yet it was identified by appellee in his testimony as being the one taken, and by the doctor as being a true representation of the leg, but the leg was also presented to the jury and even if the photograph was not correct the jury would not be misled by it.

Appellant's next criticism is that the court erred in giving appellee's first instruction, in that it does not submit the matter of who gave Cavanaugh authority or how he received it, nor does it distinguish between what constitutes a fellow servant and a vice principal. We do not believe the jury could have been misled as to where the authority must come from as the examination of the witnesses was along the line as to what superintendent Feist did and said in reference to this matter. As to this instruction not distinguishing between vice principal and fellow servant this is fully cured by appellee's fifth in-

jections of counsel for appellant to the following questions: "Who had charge of that immediate work, if anybody, of riveting the pieces together?" And other questions of like import and pertaining to the riveting of the pieces together. It is insisted that the answer to this question calls for a conclusion, and while it is of that character of question yet it was afterwards fully explained but part examined actually took in this matter. It will be noted that the question here called upon the witness to tell who had charge of the riveting of the pieces together. There was no question about this matter, and as we read this evidence appellant in its testimony took the position, and showed as far as they could, that Lewenburg was in charge of the riveting of the pieces together. We do not think this, under the state of the record, is error.

Counsel also criticize the admission of the photograph in evidence because it was not sufficiently identified. While it was not identified by the person who actually made the photograph, yet it was identified by appellee in his testimony as being the one taken, and by the doctor as being a true representation of the leg, but the leg was also presented to the jury and even if the photograph was not correct the jury would not be misled by it.

Appellant's next criticism is that the court erred in giving appellee's first instruction, in that it does not submit the matter of the plaintiff Lewenburg authority to hire he involved it, but does it distinguish between what constitutes a fellow servant and a vice principal. We do not believe the jury could have been misled as to where the authority must come from to the examination of the witnesses was along the line as to what superintendent Feist did and said in reference to this matter. As to this instruction and distinguishing between vice principal and fellow servant this is fully shown by appellee's first in-

struction which does inform the jury when a fellow servant may become a vice principal.

We do not think the criticism upon appellee's second instruction is well taken as, if for no other reason, the risks referred to and as applied to the facts in this case were fully explained in appellant's ninth instruction.

As to appellee's third instruction, appellant in its criticism says "It did not exclude the assumed risk that would arise by reason of appellee knowing either actually or constructively that the board was one that had not been furnished by appellant for appellee's use and that in using a board not furnished for his use he assumed the risk of using such a board." We cannot see why this instruction should exclude the assumption of risk of a board not furnished for his use as the instruction pertains alone to the board furnished by appellant.

As to the criticism of appellee's fifth instruction, we agree with counsel that the language used is not very aptly chosen but under the evidence in this case we do not see that it was misleading and it was certainly not so erroneous as to require a reversal of the case.

The criticism upon appellant's refused instructions seventeen and eighteen is not well taken for the reason that if under the evidence it appeared to the jury that Cavanaugh was a vice principal and directed appellee to work upon this particular platform, as claimed, that any test made by appellee would not of itself be conclusive against him as he was also entitled to the benefit of the superior knowledge and necessary inspection of the vice principal as to the conditions not apparent and known to appellee.

It appears to us from an examination of this whole record that, the vital question in this case is, Was Cavanaugh a representative of appellant in directing the use of this board as a plat-

struction which does inform the jury when a fellow servant may become a vice principal.

We do not think the criticism upon appellee's second instruction is well taken as, if for no other reason, the risks referred to and as applied to the facts in this case were fully explained in appellant's ninth instruction.

As to appellee's third instruction, appellant in its criticism says "it did not exclude the assumed risk that there would arise by reason of appellee knowing either actually or constructively that the board was one that had not been furnished by appellant for appellee's use and that in using a board not furnished for his use he assumed the risk of using such a board." We cannot see why this instruction should exclude the assumption of risk of a board not furnished for his use as the instruction pertains alone to the board furnished by appellant.

As to the criticism of appellee's fifth instruction, we agree with counsel that the language used is not very happy, though but under the evidence in this case we do not see that it was misleading and it was certainly not so erroneous as to require a reversal of the case.

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It appears to us from an examination of this whole record that, the vital question in this case is, was Cavanaugh a representative of appellant in directing the use of this board as a plat-

form upon which to work? Which, under the evidence, became a question of fact to be submitted to the jury and it having been determined by the jury that he was the representative of appellant we cannot say that its finding upon this question and its conclusion, that appellant was liable for the injuries received by appellee, was manifestly against the weight of the evidence, and we have no right to disturb the verdict and judgment of the court. The judgment is affirmed.

JUDGMENT AFFIRMED.

.....

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 I.A. 508

86

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

186 I.A. 508

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Halbert adm.
Est. Paterno

vs.

No. 41

October Term, 1913.

L. & N. R.R. Co.

~~ERROR TO~~
APPEAL FROM

City COURT

E. St. Louis ~~COUNTY~~

TRIAL JUDGE

Hon. A. H. Flowerdew

Term No. 41. Agenda No. 60.

October Term, A. D. 1913.

William U. Halbert, Administrator of the estate of Jessie Potoma, Appellee, vs. Louisville & Nashville Railroad Company, Appellant.	Appeal from City Court of East St. Louis.

McBride, P.J.

Appellee obtained judgment in the city court of East St. Louis, Illinois, for three thousand dollars which appellant seeks by this appeal to reverse.

On and prior to May 15, 1912, the appellant was operating its railroad through the city of East St. Louis and in conducting its business through said city had built a great number of tracks, about fifteen in all, across a street known as St. Louis Avenue. That in order to cross said street it became necessary to fill it, at the place where the said crossings were made, and consent of the city council of East St. Louis was procured and an ordinance passed permitting the construction of said tracks upon the condition that the said Railroad Company constructed suitable street crossings at the intersection of its track with said Avenue by planking, etc., so that the tracks may be easily and conveniently crossed at said point, and maintain and keep said crossings in good repair. The railroad lines above mentioned crossed this street between first and second streets. The railroad company constructed an approach from second street by which the level of the grade could be reached. This approach was of the width of about sixteen feet and was constructed on the south side of St. Louis Avenue, and planks of the length of

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October Term, A. D. 1913.

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vs.	Appeal from City Court of East St.Louis.
Louisville & Nashville Railroad Company, Appellant.	

Verdict,T.1.

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about sixteen feet were laid along the several rails constituting the several switches, and on the south side of said avenue, so that teams could be driven across these tracks when required. The width of St. Louis Avenue was eighty feet. It appears that the embankment which was reached by this approach was of the height of three or four feet. St. Louis Avenue extended east and west and the several railroad tracks crossed this avenue practically north and south. On the day in question Anna Belle Potoma and her daughter Jessie May Potoma, who was of the age of four years, had been visiting Mrs. Potoma's mother and doing some shopping in East St. Louis and were returning to their home which was west of the place where the railroad crosses St. Louis avenue, and in returning to their home they passed along St. Louis avenue, ascended the approach above described and at about the time they reached the second of appellant's railroad tracks a train of cars had passed to the south along the second track, from the north, which the witnesses speak of as being track No. 15. The train consisted of seven or eight freight cars and stopped with the rear car practically, if not all, upon the planking above described. The mother and daughter waited a minute or two for this car to get out of the way but it did not move and they passed around the north or rear end of the car attempting to cross over the tracks and as they were passing, the cars were suddenly backed up and, the child was run over by the wheel of the car, which resulted in its death. The evidence upon the part of appellee tends to show that no warning was given, no brakeman there to prevent persons from attempting to cross over, that no bell was rung upon the engine or whistle blown and that the sudden and unexpected movement of the cars was so negligent as to cause appellant to be responsible for the injury. While upon the other hand the evidence of appellant tends to show that a bell was ringing, that a brakeman was just beyond

about sixteen feet were laid along the several rails constituting the several switches, and on the south side of said avenue, so that teams could be driven across these tracks when required. The width of St. Louis Avenue was eighty feet. It appears that the embankment which was reached by this approach was of the height of three or four feet. St. Louis Avenue extended east and west and the several railroad tracks crossed this avenue practically north and south. On the day in question Anna Belle Totsom and her daughter Jessie May Totsom, who was of the age of four years, had been visiting Mrs. Totsom's mother and doing some shopping in East St. Louis and were returning to their home which was west of the place where the railroad crosses St. Louis avenue, and in returning to their home they passed along St. Louis avenue, ascended the approach above described and at about the time they reached the second or appellant's railroad tracks a train of cars had passed to the south along the second track, from the north, which the witnesses speak of as being track No. 12. The train consisted of seven or eight freight cars and stopped with the rear car practically, if not all, upon the planking above described. The mother and daughter waited a minute or two for this car to get out of the way but it did not move and they passed around the north or rear end of the car attempting to cross over the tracks and as they were passing, the cars were suddenly backed up and, the child was run over by the wheel of the car, which resulted in its death. The evidence upon the part of appellee tends to show that no warning was given, no brakeman there to prevent persons from attempting to cross over, that no bell was rung upon the engine or whistle blown and that the sudden and unexpected movement of the cars was so negligent as to cause appellant to be responsible for the injury. While upon the other hand the evidence of appellant tends to show that a bell was ringing, that a brakeman was just beyond

the end of the car throwing a switch preparatory to letting these cars in upon another track, that a lamp lighter who was close by warned the mother not to cross and the foreman of the crew, who was giving the signals, claims to have been standing at a point where he could see the rear end of this car and the engineer and that between the time he gave the signal to back up and the movement of the car that the mother and child came around from the east side going west and were caught and the child injured before the train could be stopped. The mother explains that the motion of the lamp lighter made to her was an invitation to come across, at least she so understood it. This train of cars was engaged in switching.

The declaration charges that on May 15, 1912, plaintiff's intestate Jessie Potoma, who was an infant of the age of four years, then in the care and custody of her mother, was crossing the railroad tracks of the defendant upon said public highway when one of defendant's freight trains that was standing partly over said crossing was by the servants in charge thereof suddenly, negligently and carelessly backed over said crossing and against plaintiff's intestate while the mother of plaintiff's intestate was in the exercise of due care and caution for the safety of the deceased.

It is contended by counsel for appellant in the argument of this case that the appellant and its employes were not guilty of the negligence which caused the injury of the deceased and that the mother of the deceased was not in the exercise of due care for the safety of the child in attempting to cross so near the end of the car and at a pmoint north of the planked crossing. T hese two questions have been treated separately by counsel in their briefs but the several acts of appellant and of the mother of deceased are so closely associated one with the other, and the law applicable to both questions being the same, the two will

the end of the car throwing a switch preparatory to letting these cars in upon another track, that a lamp lighter who was close by warned the mother out in arms and the foreman of the crew, who was giving the signals, claims to have been standing at a point where he could see the rear end of this car and the engineer and that between the time he gave the signal to back up and the movement of the car that the mother and child came around from the east side going west and were caught and the child injured before the train could be stopped. The mother explains that the motion of the lamp lighter made to her was an invitation to come across, at least she so understood it. This train of cars was engaged in switching.

The declaration charges that on May 15, 1912, plaintiff's intestate Jessie Jetson, who was an infant of the age of four years, then in the care and custody of her mother, was crossing the railroad tracks of the defendant upon said public highway when one of defendant's freight trains that was standing partly over said crossing was by the servants in charge thereof negligently, negligently and carelessly backed over said crossing and against plaintiff's intestate while the mother of plaintiff's intestate was in the exercise of due care and caution for the safety of the deceased.

It is contended by counsel for appellant in the argument of this case that the appellant and its employes were not guilty of the negligence which caused the injury of the deceased and that the mother of the deceased was not in the exercise of due care for the safety of the child in attempting to cross so near the end of the car and at a point north of the planked crossing. These two questions have been treated separately by counsel in their briefs but the several acts of appellant and of the mother of deceased are so closely associated one with the other, and the law applicable to both questions being the same, the two will

be considered together. The testimony of Anna Belle Potoma, mother of the deceased, is that as they were returning home from the city they ascended this approach and upon reaching the second of appellant's tracks found a car standing partly over the planked crossing; that this was the rear car of a freight train of seven or eight cars, that it had just passed to the south. That there were several feet between the north end of this car and the north end of the planked crossing. That after waiting a minute or two the train made no movement; that the man engaged in the lighting of lamps near by her, as she understood it, motioned to her to come across the track; that there was no one except the lamp lighter near the rear end of the train and that there was no one on the car. That when the lamp lighter motioned to her she understood this motion to be for her to come across and that she and her daughter immediately started to cross the tracks; that in crossing the tracks they passed three or four feet north of the rear end of this car and, as she claims, upon the planked way, and when they had gotten fairly upon the track the train suddenly and without any warning of any kind backedup to the north, ran over the child and injured it. S he and the lamp lighter both attempted to save the life of the child and in this attempt ran together and as the result neither were able to save the child. She also testifies that no bell was rung or whistle sounded before the train started to move back. Other witnesses testify that the car was between the foreman, who gave the signals to move the train, and the mother; the foreman being upon the west and the mother upon the east side. Other testimony is to the effect that when the mother attempted to pass around the north side she was carrying some bundles and did not have hold of the child's hand; that she passed off of the planking but was still in the street. The witness Sadler

be considered together. The testimony of Alma Bella Tatum, mother of the deceased, is that as they were returning home from the city they reached this approach and upon reaching the ground of appellant's tracks found a car standing partly over the planked crossing; that this was the rear car of a freight train of seven or eight cars, that it had just passed to the south. That there were several feet between the north end of this car and the north end of the planked crossing. That after waiting a minute or two the train made no movement; that she saw engaged in the lighting of lamps near by her, as she understood it, motioned to her to come across the track; that there was no one except the lamp lighter near the rear end of the train and that there was no one on the car. That when the lamp lighter motioned to her she understood this motion to be for her to come across and that she and her daughter immediately started to cross the tracks; that in crossing the tracks they passed three or four feet north of the rear end of this car and, as she claims, upon the planked way, and when they had gotten fairly upon the track the train suddenly and without any warning of any kind backed to the north, ran over the child and injured it. S be and the lamp lighter both attempted to save the life of the child and in this attempt ran together and as the result neither were able to save the child. She also testifies that as bell was rung or whistle sounded before the train started to move back. Other witnesses testify that the car was between the foreman, who gave the signals to move the train, and the mother; the foreman being upon the west and the mother upon the east side. Other testimony is to the effect that when the mother attempted to pass around the north side she was carrying some bundles and did not have hold of the child's hand; that she passed off of the planking but was still in the street. The witness Sadler

stated that he saw the lamp lighter make the motion to the woman and that he took the motion to be for her to stand back and not try to pass over. The mother states that she knew the engine was attached to the cars but did not know it was liable to move back any moment and did not think it would come back. Another witness introduced by appellee by the name of Grace Harmon testified that the child was run over about two feet south of the north end of the planking. The evidence further discloses that this street was used to considerable extent for foot passengers but very little for teams. The testimony of the engineer and fireman, witnesses introduced by appellant, state that the bell upon the engine was ringing, that it was ringing as the train went down towards the south, and while the train stood there and while it was backing, that the ringing was produced by an automatic ringer; that they knew nothing of the woman and child being upon the tracks until after the injury and the engineer says he was backing the train in accordance with the signals given to him by the foreman Arlinger. Arlinger testifies that before and at the time of the injury he stood about sixty feet from the train so as to see the engineer and was in a position that he could see the rear end of the car that stood upon the crossing and that between the time that he gave the signal to the engineer to back up and the time the train commenced backing he saw the woman and child pass around on the east side of the rear car and immediately gave the emergency signal and the engineer immediately and quickly applied the emergency brake and stopped the train within a distance of eight or ten feet and that had it not been for the slack in the couplings they would have been able to have saved the child. John Jenkins, the lamp lighter, testified that the car was about three feet north of the crossing and that he saw her attempt to pass over and he motioned

stated that he saw the Jump Lighter make the motion to the woman and that he took the motion to be for her to stand back and not try to pass over. The mother states that she knew the engine was attached to the cars but did not know it was liable to move back any moment and did not think it would come back. Another witness introduced by appellee by the name of Grace Harman testified that the child was run over about two feet south of the north end of the platform. The evidence further discloses that this street was used to considerable extent for foot passengers but very little for teams. The testimony of the engineer and Yarman, witnesses introduced by appellant, state that the bell upon the engine was ringing, that it was ringing as the train went down towards the south, and while the train stood there and while it was backing, that the ringing was produced by an automatic ringer; that they knew nothing of the woman and child being upon the track until after the injury and the engineer says he was backing the train in accordance with the signals given to him by the foreman Yaringer. Yaringer testifies that before and at the time of the injury he stood about sixty feet from the train so as to see the engineer and was in a position that he could see the rear end of the car that stood upon the crossing and that between the time that he gave the signal to the engineer to back up and the time the train commenced backing he saw the woman and child pass around on the south side of the rear car and immediately gave the emergency signal and the engineer immediately and quickly applied the emergency brake and stopped the train within a distance of eight or ten feet and that had it not been for the slack in the couplings they would have been able to have saved the child. John Jenkins, the Jump Lighter, testified that the car was about three feet north of the crossing and that he saw her attempt to pass over and he motioned

to her to stop and says that she stopped for a moment or two and then came on. George Elliott, a switchman whose affidavit was read as his evidence, states that he saw the deceased and her mother standing at the track as the cars passed by them and he told the mother of the deceased not to cross the tracks, and he told John Jenkins the lamp lighter, not to let her cross the tracks; that he then walked up two car lengths from the rear car to cut off two cars that were going to be placed on track No. 15 in said yards and that he was ready to make the cut when the train backed. Mrs. Potoma denies that this witness made any such statement to her or that any one told her not to cross the tracks; and it is conceded that the witness Jenkins does not remember of Elliott saying anything of the kind to him.

Counsel for appellant in his argument contends that in as much as the accident happened north of this board crossing that it was necessarily negligence upon the part of the mother to pass around the train north of the board crossing. It appears, however, from the evidence that notwithstanding the accident may have happened north of the board crossing it was still in the street, and we can see no reason why she would be confined in her travel more to one part of the street than another. She had as much right upon St. Louis Avenue as the Railroad Company had to be there with its cars. It was a public street and its use by the Company was subject to the right of the general public to use it. Where Railroad Companies cover a public street with a large number of tracks they must observe unusual care and take extra precautions to avoid injuries to persons passing along the street or side walk. I. S . & M. S. Ry. Co. vs. Johnson, 135 Ill., 641. In the permission granted to appellant to fill in the street and use it for a crossing by its railroads, it undertook and agreed to keep it in reasonable condition for travel

to that to stop and says that she stopped for a moment or two and then came on. George Elliott, a switchman whose affidavit was read as his evidence, states that he saw the deceased and her mother standing at the track as the cars passed by them and he told the mother of the deceased not to cross the tracks, and he told Jenkins the lamp lighter, not to let her cross the tracks; that he then walked up two car lengths from the part cut to cut off two cars that were going to be placed on track No. 18 in Gold yards and that he was ready to take the out when the train backed. Mrs. Totten denies that this witness made any such statement to her or that any one told her not to cross the tracks; and it is conceded that the witness Jenkins does not remember of Elliott saying anything of the kind to him.

Counsel for appellant in his argument contends that in as much as the accident happened north of this board crossing that it was necessarily negligence upon the part of the mother to pass around the train north of the board crossing. It appears, however, from the evidence that notwithstanding the accident may have happened north of the board crossing it was still in the street, and we can see no reason why she would be confined in her travel more to one part of the street than another. The Bad as much right upon St. Louis Avenue as the Railroad Company had to be there with its cars. It was a public street and its use by the Company was subject to the right of the general public to use it. Where Railroad Companies cover a public street with a large number of tracks they must observe unusual care and take extra precautions to avoid injuries to persons passing along the street or side walk. I. S. & K. S. Ry. Co. vs. Johnson, 150 Ill., 641. In the permission granted to appellant to fill in the street and use it for a crossing by its railroads, it undertook and agreed to keep it in reasonable condition for travel.

The circumstances as detailed by the several witnesses are conflicting and if the evidence of the witnesses for appellee is to be taken as true then the appellant was guilty of suddenly, negligently and carelessly backing over said crossing, as charged in the declaration. While it appears from the testimony of the foreman that the mother approached the track between the time he gave the signal and the time the train commenced to back, yet if the lamp lighter gave her a signal or she understood the signal given by the lamp lighter to cross over, and no warning was given that they were about to back the train, as claimed by appellee's witnesses, then the jury would be warranted in finding that the mother of the deceased was in the exercise of due care. If the train was standing still at the time the mother attempted to pass over the track she would not as a matter of law be thereby guilty of negligence but it was a question of fact for the jury to determine under all the circumstances. C. & E. I. R. R. vs. Filler, 195 Ill., 9. We must admit that the cases of Chicago Terminal Transfer Co. vs. Belberg, 174 App., 113, and Chicago Terminal Trans. R. R. Co. vs. Kerando, 129 App., 620, cited by counsel for appellant seem to sustain his contention in this case but as we understand the rule of law as laid down by the Supreme Court, where the evidence is of the character of that introduced upon the trial of this case, that it necessarily becomes a question for the jury to determine what is negligence of the defendant and due care of the plaintiff: where the facts are fully and fairly before the jury they should be left to determine from all of the circumstances whether the appellant was guilty of negligence or the appellee of want of due care, and this doctrine is fully sustained by the case of Chi. Milwaukee & St. Paul Ry. Co. vs. Halsey, Admr., 132 Ill., 248; Ill. Central R. R. Co. vs. Cragin, 71 Ill., 183; Chicago & Atlant-

The circumstances as detailed by the several witnesses are conflicting and if the evidence of the witnesses for appellee is to be taken as true then the appellant was guilty of suddenly, negligently and carelessly backing over said crossing, as charged in the declaration. While it appears from the testimony of the foreman that the engineer [illegible] the lapse between the time he gave the signal and the time the train commenced to back, yet if the lamp lighter gave her a signal or she understood the signal given by the lamp lighter to cross over, and no warning was given that they were about to back the train, as claimed by appellee's witnesses, then the jury would be warranted in finding that the mother of the deceased was in the exercise of due care. If the train was standing still at the time the mother attempted to pass over the track she would not as a matter of law be thereby guilty of negligence but it was a question of fact for the jury to determine under all the circumstances. C. & A. R. R. Co. vs. Miller, 190 Ill., 9. We must admit that the cases of Chicago Terminal Transfer Co. vs. Helberg, 124 App., 112, and Chicago Terminal Trans. R. R. Co. vs. Korando, 129 App., 620, cited by counsel for appellant seem to sustain his contention in this case but as we understand the rule of law as laid down by the Supreme Court, where the evidence is of the character of that introduced upon the trial of this case, that it necessarily becomes a question for the jury to determine what is negligence of the defendant and due care of the plaintiff; where the facts are fully and fairly before the jury they should be left to determine from all of the circumstances whether the appellant was guilty of negligence or the appellee of want of due care, and this doctrine is fully sustained by the case of Chi. Milwaukee & St. Paul Ry. Co. vs. Halsey, [illegible] Ill., [illegible]; Ill. Central R. R. Co. vs. Cragin, 71 Ill., 177; Chicago & Alton-

ic Ry. Co. vs. Carey, 115 Ill., 115; and many other cases that might be cited. While there is room for disputeas to what is the true status of the parties in this case, yet we feel that the verdict of the jury under the circumstances must settle it and that we are not warranted in saying that the verdict is so manifestly against the weight.of the evidence as to cause us to disturb the verdict.

It is next contended by counsel for appellant that the damages given by the jury are excessive. There was no evidence introduced as to the condition of the child's health or its promises intellectually or otherwise but only that a child of the age of four years was killed, and while we would have been better satisfied with a verdict for a less amount, yet there is no data given as to the child's future, no improper evidence or instructions of the court upon this question and no reason that we can see to cause the jury to exercise other than its best judgment as to the amount of damages, and it became a matter solely for the jury. It is said in the case of B. & O. S-W Ry. Co. vs. Then, 159 Ill., 539, "Now this pecuniary damage is to be measured, - in other words, what is to be the amount of the verdict, - must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize the difficulty of exact measurement, and commits the question especially to the finding of the jury." And again in the case of City of Chicago vs. Mesing, 83 Ill., 204, it is said, "When proof is made of the age and relationship of the deceased to the next of kin, the jury may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experience in relation to matters of common observation." This was a question for the jury, subject to review only when it appears from the record

to Ky. Co. vs. Carey, 115 111., 115; and many other cases that might be cited. While there is room for disputes to what is the true status of the parties in this case, yet we feel that the verdict of the jury under the circumstances must settle it and that we are not warranted in saying that the verdict is so manifestly against the weight of the evidence as to cause us to disturb the verdict.

It is next contended by counsel for appellant that the damages given by the jury are excessive. There was no evidence introduced as to the condition of the child's health or its prospects intellectually or otherwise but only that a child of the age of four years was killed, and while we would have been better satisfied with a verdict for a less amount, yet there is no data given as to the child's future, no improper evidence or instructions of the court upon this question and no reason that we can see to cause the jury to exercise other than its best judgment as to the amount of damages, and it become a matter solely for the jury. It is said in the case of B. & O. R. R. Co. vs. Then, 159 111., 539, "How this pecuniary damage is to be measured, - in other words, what is to be the amount of the verdict, - must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize the difficulty of exact measurement, and commits the question especially to the finding of the jury." And again in the case of City of Chicago vs. Hesing, 83 111., 204, it is said, "When proof is made of the age and relationship of the deceased to the next of kin, the jury may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experience in relation to matters of common observation." This was a question for the jury, subject to review only when it appears from the record

that the jury has from some cause over estimated the pecuniary value of the life of the deceased.

The next contention is, that the court erred in granting appellee's third instruction, in this, that the instruction might be construed by the jury, "To include the time before she went upon the track, and so excuse her passing off of the crossing and going too close to the end of the car." Also that the instruction was leveled at the care of the mother for her own safety and not for the safety of the child. We do not believe that this instruction is subject to the criticism offered. It had reference not only to the time that she was about to cross the track but while she was crossing and also to the safety of the child, and we think it could not be misunderstood as to what was meant by the peril referred to in the instruction.

The criticism made upon the ninth instruction is not well taken as it directs that the damages sustained must be ascertained from the evidence and under the instructions of the court. The next instruction complained of tells the jury that the plaintiff is only entitled to recover for the pecuniary injury.

The criticism upon the refusal of the court to give appellant's second refused instruction is without merit as the instruction was clearly wrong, in this, that it pointed out certain particular things that the mother would have to do in order to relieve herself of contributory negligence. It is not proper to direct what particular things she should or should not do to constitute a want of due care, as this is a matter to be determined from the whole evidence in the case and not from any particular facts or circumstances.

We have carefully considered this record but are unable to say that the verdict of the jury is manifestly against the weight of the evidence or that the court erred in any of the instructions criticised and as we view it the judgment of the lower court must be affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

that the jury has first some cause over estimated the pecuniary value of the life of the deceased.

The next contention is, that the court erred in granting appellee's third instruction, in this, that the instruction might be construed by the jury, "To include the time before she went upon the track, and so excuse her passing off of the crossing and going too close to the end of the car." Also that the instruction was leveled at the case of the mother for her own safety and not for the safety of the child. We do not believe that this instruction is subject to the criticism offered. It had reference not only to the time that she was about to cross the track but while she was crossing and also to the safety of the child, and we think it could not be misunderstood as to what was meant by the peril referred to in the instruction.

The criticism made upon the ninth instruction is not well taken as it directs that the damages sustained must be ascertained from the evidence and under the instructions of the court. The next instruction complained of tells the jury that the plaintiff is only entitled to recover for the pecuniary injury.

The criticism upon the refusal of the court to give appellant's second refused instruction is without merit as the instruction was clearly wrong, in that, that it produced and contains particular things that the mother would have to do in order to relieve herself of contributory negligence. It is not proper to direct what particular things she should or should not do to constitute a want of due care, as this is a matter to be determined from the whole evidence in the case and not from any particular facts or circumstances.

We have carefully considered this record but are unable to say that the verdict of the jury is manifestly against the weight of the evidence or that the court erred in any of the instructions criticised and as we view it the judgment of the lower court must be affirmed.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 I.A. 510

987

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Davis et al

vs.

Wilmore et al

No. 42

October Term, 1913.

~~ERROR TO~~
APPEAL FROM

186 I.A. 510

Circuit **COURT**

Franklin **COUNTY**

TRIAL JUDGE

Hon. W. H. Green

Term No. 42. Agenda No. 57.

October Term, A. D. 1913.

H. G. Davis, W. H. Lampley and Douglas Whittington, Appellees, vs. John H. Willmore and John Staphen, Appellants.	Appeal from the Circuit Court of Franklin County.

186 I.A. 510

McBride, P.J.

This was a proceeding brought by appellee as sub contractor to enforce a materialmen's lien against the property of appellant. A decree was rendered in favor of appellee. The bill alleges that on or about the 10th day of June, 1912, John H. Willmore, a contractor, entered into a contract with appellant to erect and complete a house for appellant on lot 6 Block 21, in Lindsays First Addition to the town of Lindsay, Franklin County, Illinois, and that appellant John Staphen was then and is now the owner of said premises. That immediately after entering into such contract the said John H. Willmore entered into an agreement with appellee to furnish the building materials to be used in the erection and completion of said dwelling house which was then being constructed. That no particular amount of lumber or other building material was specifically contracted for but that appellee was to furnish such lumber and materials as the said Willmore would from time to time need in the erection and construction of said dwelling house. That immediately after the making of such contract appellees commenced the furnishing of such building materials and continued to furnish and supply said Willmore with such materials as were needed until July 19, 1912, at which time the last delivery of building materials was made; and then were that building materials were supplied by the appellees to the amount of $502.09 which is due and unpaid. That on the 11th day

Term No. 42. Agenda No. 57.

October Term, A. D. 1913.

H. G. Davis, W. H. Langley and Douglas Whittington, Appellees,	Appeal from the Circuit Court of Franklin County.
vs.	
John H. Willmore and John Stephen, Appellants.	

186 I.A. 510

Sylvain, J.:

This was a proceeding brought by appellee on sub contractor to enforce a materialmen's lien against the property of appellant. A decree was rendered in favor of appellee. The bill alleges that on or about the 10th day of June, 1912, John H. Willmore, a contractor, entered into a contract with appellant to erect and complete a house for appellant on lot 6 Block 22, in Lindsay First Addition to the town of Lindsay, Franklin County, Illinois, and that appellant John Stephen was then and is now the owner of said premises. That immediately after entering into such contract the said John H. Willmore entered into an agreement with appellee to furnish the building materials to be used in the erection and completion of said dwelling house which was then being constructed. That no particular amount of lumber or another ma building material was specifically contracted for but that appellee was to furnish such lumber and materials as the said Willmore would from time to time need in the erection and construction of said dwelling house. That immediately after making of such contract appellees commenced the furnishing of such building materials and continued to furnish and supply said Willmore with such materials as were needed until July 15, 1912, at which time the last delivery of building materials was made; and then every that building materials were supplied by the appellees in the amount of $502.09 which is due and unpaid. That on the 11th day

of September, 1912, he served a notice for sub-contractor's lien upon appellant. Athe appellant filed an answer to this bill and admits having entered into a contract with the said John H. Willmore for the erection of said building and that the appellees contracted with said John H. Willmore for the sale to him of lumber and other building materials to be used in the construction of such dwelling house upon said lot, and that the building material placed in said building was worth $502.09. That a written notice in due form for sub contractor's lien was served upon appellant on September 11, 1912, but denies that said notice was served within sixty days after the delivery of said material was completed, and denies that said notice was served as required by the statute on liens. Later the appellant filed an answer to appellees amended bill in which he denies the contract of appellees with W illmore and denies that any material furnished by appellees was placed in said building, and denies the service of said notice, and denies that he owes appellees any amount whatever, but avers that the building material furnished by appellees has been wholly paid by the said Willmore, and avers that he has paid to said Willmore the full price agreed upon for the erection and completion of said building. The cause was heard and testimony taken in open court and a decree rendered in facor of appellees for $450.79, which is declared to be a lien upon the premises in question.

It appears from the testimony of appellee and Willmore that a written contract was entered into between Willmore and appellant whereby on June 10, 1912, Willmore agreed to build and complete for appellant the house in question, for which appellant agreed to pay him $750.00, one-third thereof to be paid when the house was inclosed and the balance when the house was completed, and that the house was to be finished not later than July 10th, and that the house was completed on about the 20th day of July,

of September, 1912, he served a notice for sub-contractor's lien upon appellant. Athe appellant filed an answer to this bill and admits having entered into a contract with the said John K. Willmore for the erection of said building and that the appellees contracted with said John K. Willmore for the sale to him of lumber and other building materials to be used in the construction of such dwelling house upon said lot, and that the building material placed in said building was worth $502.02. That a written notice in due form for sub contractor's lien was served upon appellant on September 11, 1912, but denies that said notice was served within sixty days after the delivery of said material was completed, and denies that said notice was served as required by the statute on liens. Later the appellant filed an answer to appellees amended bill in which he denies the contract of appellees with W illmore and denies that any material furnished by appellees was placed in said building, and denies the service of said notice, and denies that he owes appellees any amount whatever, but avers that the building material furnished by appellees has been wholly paid by the said Willmore, and avers that he has paid to said Willmore the full price agreed upon for the erection and completion of said building. The cause was heard and testimony taken in open court and a decree rendered in favor of appellees for $450.79, which is declared to be a lien upon the premises in question.

It appears from the testimony of appellee and Willmore that a written contract was entered into between Willmore and appellant whereby on June 10, 1912, Willmore agreed to build and complete for appellant the house in question, for which appellant agreed to pay him $780.00, one-third thereof to be paid when the house was inclosed and the balance when the house was completed, and that the house was to be finished not later than July 15th, and that the house was completed on about the 25th day of July,

1912. It further appears from the testimony that shortly after the making of said contract to erect said house, Willmore contracted with appellees to furnish the building material to be used in the erection and completion of this building, for which he was to pay what such building material was reasonably worth; that appellees commenced furnishing the building material contracted for on June 17th, 1912, and from time to time furnished such materials as were requested by Willmore, and that appellees completed the delivery of such materials on July 19, 1912. It further appears that appellant paid Willmore substantially the whole of the contract price for the erection of such building and that such payments were made at different times, the last payment having been made on August 20,1912, but it does not appear what the last payment amountedto. It further appears from the evidence that appellees served a written notice as sub contractor in the manner required by statute upon appellant on September 11, 1912, advising appellant that they had been employed by John H. Willmore to furnish lumber and building material for said building under his contract for the erection of a House upon said lot, and that there was then due them $50[illegible].09. Appellant offered no evidence disputing the facts as testified to and above set forth but contends that in as much as the agreement between him and Willmore was that the said Willmore was,"To provide at his own expense all the labor and material necessary,and erect, build andfinish in workmanlike manner a frame dwelling house on lot 6, etc.", that this provision in the contract in effect worked a waiver of any lien of the contractor, and also had the effect of defeating appellees' lien as such sub-contractor, and invokes as an authority to sustain this contention the case of Kelley vs. Johnson, 251 Ill., 135. As we understand the case referred to, the question there determined by the court was that where a contractor had expressly waived a lien that such

1912. It further appears from the testimony that shortly after the making of said contract to erect said house, Willmore contracted with appellees to furnish the building material to be used in the erection and completion of this building, for which he was to pay what such building material was reasonably worth; that appellees commenced furnishing the building material contracted for on June 17th, 1912, and from time to time furnished such materials as were requested by Willmore, and that appellees completed the delivery of such materials on July 18, 1912. It further appears that appellees notwithstanding the whole of the contract price for the erection of such building and that such payments were made at different times, the last payment having been made on August 20,1912, but it does not appear what the last payment amounted to. It further appears from the evidence that appellees served a written notice as sub-contractor in the manner required by statute upon appellant on September 12, 1912, advising appellant that they had been employed by John H. Willmore to furnish lumber and building material for said building under his contract for the erection of a house upon said lot, and that there was then due them $520.00. Appellant offered no evidence disputing the facts as testified to and above set forth but contends that in as much as the agreement between him and Willmore was that the said Willmore was, "To provide at his own expense all the labor and material necessary, and erect, build and finish in workmanlike manner a frame dwelling house on lot 6, etc.", that this provision in the contract in effect worked a waiver of any lien of the contractor, and also had the effect of defeating appellees' lien as such sub-contractor, and invokes as an authority to sustain this contention the case of Kelley vs. Johnson, 201 Ill., 326. In we understand the case referred to, the question there determined by the court was that where a contractor had expressly waived a lien that such

waiver had the effect of defeating any sub-contractor's lien, where such sub-contractor was made after the waiver but did not effect sub-contracts made prior to the waiver. As we read the contract in this case, and the clause above referred to and relied upon by counsel for appellant, it was in no manner a waiver of a lien or any pretense of such waiver. It cannot be said that simply because Fillmore agreed to furnish all material, lumber and labor, at his own expense, and deliver the house in question to appellant, that either one of the parties understood thereby that any liens or rights that they had were waived. We concede that the case above referred to holds, in effect, that where a contractor expressly waives his lien that the effect of it is to defeat the sub-contractor's lien but we do not believe that the language above referred to has the effect of waiving the lien by the original contractor. It is suggestedby counsel for appellant that appellee did not inquire into the nature of the contract entered into between appellant and Fillmore and therefore his rights were not protected under it. The only effect that a failure upon the part of appellee as sub-contractor, to investigate the contract entered into between appellant and Fillmore would be that he would incur the risk of such contractor having waived such liens.

It is again contended by counsel for appellant that the evidence of appellee shows that the lumber was furnished to him from year to year upon a general open account; we do not so understand this evidence. The testimony of appellee, which is not in any manner disputed is, that he contracted with Fillmore to furnish the building material for this particular house, and testified that such materials were charged upon his books as an account to "John H. Fillmore, the job to be Tuckner". It further appears from the evidence that the materials furnished by appellee were actually usedin the construction of such building at

waiver had the effect of defeating any sub-contractor's lien, where such sub-contracts was made after the waiver but did not effect sub-contracts made prior to the waiver. As we read the contract in this case, and the clause above referred to and relied upon by counsel for appellant, it was in no manner a waiver of a lien or any pretense of such waiver. It cannot be said that simply because Tillmore agreed to furnish all material, lumber and labor, at his own expense, and deliver the house in question to appellant, that either one of the parties understood thereby that any liens or rights that they had were waived. We concede that the case above referred to holds, in effect, that where a contractor expressly waives his lien that the effect of it is to defeat the sub-contractor's lien but we do not believe that the language above referred to has the effect of waiving the lien by the original contractor. It is suggestedby counsel for appellant that appellee did not inquire into the nature of the contract entered into between appellant and Tillmore and therefore his rights were not protected under it. The only effect that a failure upon the part of appellee as sub-contractor,to investigate the contract entered into between appellant and Tillmore would be that he would incur the risk of such contractor being unable such liens.

It is again contended by counsel for appellant that the evidence of appellee shows that the lumber was furnished in mix from year to year upon a general open account; we do not understand this evidence. The testimony of appellee, which is not in any manner disputed is, that he contracted with Tillmore to furnish the building material for this particular house, and testified that such materials were charged upon his books as on account to "John R. Tillmore, the job to be Tuckner". It further appears from the evidence that the materials furnishing by appellee were actually needin the construction of such building at

Buckner, that they were reasonably worth the prices charged, that the sub-contractor's notice was given within sixty days of the furnishing of the last materials, and that the Chancellor was well warranted in finding that appellee was entitled to a lien upon the said premises for the amount due for the material so furnished. We can see no reason why this case should be reversed and the decree of the Circuit Court is affirmed.

AFFIRMED.

(Not to be reported in full.)

Buildmor, that they were reasonably worth the prices charged, that the sub-contractor's notice was given within sixty days of the furnishing of the last materials, and that the Claimant was well warranted in filing that supplies are entitled to a lien upon the said premises for the amount due for the material so furnished. We can see no reason why this case should be reversed and the decree of the trial court is affirmed.

AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 511

988

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

186 I.A. 511

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

M C Kissick

vs.

No. 48

October Term, 1913.

O'Gara Coal Co

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

Hon. C V Lewis

Term No. 48. Agenda No. 30.

October Term, A. D. 1913.

John McKissick, Appellee,	)	
vs.	)	Appeal from Saline County.
O'Gara Coal Company, Appellant.	)	

McBride, P.J.

Appellee recovered a judgment in the court below for $650.00. Appellee was a man of the age of 29 years; had been working in this mine during the last four or five years engaged at different times in the capacity of timberman, shooting, loading coal, laying track, running machines and acting as helper for machine runners. At the time he was injured he was working in the capacity of helper to Charles Davison, a machine runner, in room No. 6, off the sixth north entry of the main west entry. During the day they had under-cut five or six rooms and entries before going into room No. 6. They began cutting on the left hand side of room No. 6, and has under-cut six boards and were working upon the seventh one when without any warning a large amount of coal, about twenty-five hundred pounds fell from the face of the room, caught appellee and injured him. It appears from the evidence of the plaintiff that before beginning work in this room they examined the face of the coal and found no powder cracks, slips or negro-heads or anything of that character. While appellee had worked around this mine for a considerable length of time, it appears that he had not seen this part of the mine before that day; that he was not acquainted with the rooms and place where he was at work and knew nothing about the thickness of the pillars. It further appears from the evidence

Term No. 48. Agenda No. 30.

October Term, A. D. 1906.

John McKinsick,
Appellee,
vs.
O'Gara Coal Company,
Appellant.

Appeal from Saline Circuit.

McKinsick, J.

Appellee recovered a judgment in the court below for $650.00. Appellee was a man of the age of 23 years; had been working in this mine during the last four or five years engaged at different times in the capacity of timberman, shoveling loading coal, laying track, running machines and working as helper for machine runners. At the time he was injured he was working in the capacity of helper to Charles Watson, a machine runner, in room No. 6, off the sixth north entry of the main west entry. During the day they had under-cut five or six rooms and entries before going into room No. 6. They began cutting on the left hand side of room No. 6, and had under-cut six boards and were working upon the seventh one when without any warning a large amount of coal, about twenty-five hundred pounds fell from the face of the room, caught appellee and injured him. It appears from the evidence of the plaintiff that before beginning work in this room they examined the face of the coal and found no powder cracks, slips or negro-heads or anything of that character. While appellee had worked around this mine for a considerable length of time, it appears that he had not seen this part of the mine before that day; that he was not acquainted with the rooms and place where he was at work and knew nothing about the thickness of the pillars. It further appears from the evidence

that the pillars of this room varied in thickness from five to ten feet and that they were wider at the entry than at the face of the coal where the men were at work. It also appears from the testimony of miners engaged in this kind of work that to properly support a roof it was necessary to leave a pillar of about the width of twenty feet, and that when the pillar was allowed to become too thin it would not properly support the roof and would bring on what is called a squeeze in a mine, and was liable to press the coal out from the face of the room. There was a conflict of testimony as to whether or not a squeeze actually existed in this room at the time of the injury; some of the witnesses testifying to facts which were evidences of a squeeze and others say that they did not see any such evidence.

The declaration charges a dangerous condition in this room "On account of the rib on each side of the room being so thin as to allow the coal and pillars to press out from the face of the coal when the coal was undercut. That the room opposite the one in which the injury is alleged to have occurred had been driven within fifty feet from the latter end. That by reason of the coal having been worked out from adjacent rooms the support of the roof was insufficient. That the plaintiff did not know of the dangerous condition alleged and was in the exercise of due care and caution for his own safety. That while at work in the room named, on account of the conditions alleged, the plaintiff was injured by a quantity of coal falling on him from the face of the coal he was under-cutting, injuring him, etc."

It is contended by counsel for appellant that "There was no effort whatever made to show that there was or had been any squeeze in the mine and the fact is that the conditions as described by the witnesses precluded the possibility of there having been a squeeze at that time, or that the coal was caused to fall

that the pillars of this room varied in thickness from five to ten feet and that they were wider at the entry than at the face of the coal where the men were at work. It also appears from the testimony of miners engaged in this kind of work that to properly support a roof it was necessary to leave a pillar of about the width of twenty feet, and that when the pillar was allowed to become too thin it would not properly support the roof and would bring on what is called a squeeze in a mine, and was liable to press the coal out from the face of the room. There was a conflict of testimony as to whether or not a squeeze actually existed in this room at the time of the injury; some of the witnesses testifying to facts which were evidences of a squeeze and others say that they did not see any such evidence.

The declaration charges a dangerous condition in this room "On account of the rib on each side of the room being so thin as to allow the coal and pillars to press out from the face of the coal when the coal was undercut. That the room opposite the one in which the injury is alleged to have occurred had been driven within fifty feet from the latter end. That by reason of the coal having been worked out from adjacent rooms the support of the roof was insufficient. That the plaintiff did not know of the dangerous condition alleged and was in the exercise of due care and caution for his own safety. That while at work in the room named, on account of the conditions alleged, the plaintiff was injured by a quantity of coal falling on him from the face of the coal he was under-cutting, injuring him, etc."

It is contended by counsel for appellant that "there was no effort whatever made to show that there was or had been any squeeze in the mine and the fact is that the conditions as described by the witnesses precluded the possibility of there having been a squeeze at that time, or that the coal was caused to fall

by any movement of the earth above, because it was shown to have been solid rock and with no break in it, so that from these facts counsel insist that the cause should have been taken from the jury at the close of plaintiff's evidence." He further insists that the injury was an accident and that the proximate cause of the injury has not been proven.

It is not necessary in this opinion to go into the details of the testimony of the several witnesses with reference to conditions existing, but it does appear from the testimony of some of plaintiff's witnesses that the pillar between rooms five and six was of a thickness of about five or six feet, and it further appears from the evidence of expert witnesses, miners engaged in this character of work, that when the pillars of a room are thinned to this width, that is not sufficient to support the heavy pressure from above and produces a squeeze, which, as some of the witnesses say, results in bringing such a pressure upon the coal at the face of the room that, when undercut, it is liable to break off and fall out. One of these witnesses also testified that he observed in this room, within three or four days of this injury, that a squeeze existed; that the pillars were chipping off because of the heavy pressure upon them, and, while it is true that the mine examiner testified that he did not observe any of these conditions, he does not deny but that such conditions existed and the same may be said of other witnesses offered on behalf of the appellant. The appellee was not acquainted with the conditions surrounding this room; had not observed the width of the pillars and his attention had not in any manner, so far as the evidence shows, been called to the fact that the pillars were thin but the appellant knew or should have known of the thinness of the pillars and the effect that a reducing of them would have upon the roof of the room and the coal. If it is true, as contended by appellee and his wit-

by any movement of the earth above, because it was shown to have been solid rock and with no break in it, so that from these facts counsel insist that the nonsuit should have been taken from the jury at the close of plaintiff's evidence." He further insists that the injury was an accident and that the proximate cause of the injury has not been proven.

It is not necessary in this opinion to go into the details of the testimony of the several witnesses with reference to conditions existing, but it does appear from the testimony of some of plaintiff's witnesses that the pillar between rooms five and six was of a thickness of about five or six feet, and it further appears from the evidence of expert witnesses, who are engaged in this character of work, that when the pillars of a room are thinned to this width, that is not sufficient to support the heavy pressure from above and produce a squeeze, which, as some of the witnesses say, results in bringing such a pressure upon the coal at the face of the room that, when mining out, it is liable to break off and fall out. One of these witnesses also testified that he observed in the room, within three or four days of this injury, that a squeeze existed; that the pillars were chipping off because of the heavy pressure upon them, and, while it is true that the mine superintendent testified that he did not observe any of these conditions, he does not deny but that such conditions existed and the same may be said of other witnesses offered on behalf of the appellant. The appellee was not acquainted with the conditions surrounding this room; but not observed the width of the pillars and his statements had not in any manner, as far as the evidence shows, been called to the fact that the pillars were thin but the appellants knew or should have known of the thinness of the pillars and the effect that a reducing of them would have upon the roof of the room and the coal. If it is true, as contended by appellee and his wit-

nesses, that the thinning of the pillars brought on a squeeze in this room which would have a tendency to produce pressure enough upon the face of the coal to push it down, or break it off when undercut, then the jury would be warranted in finding that appellant had been negligent in permitting such conditions to exist, and that such conditions caused the injury complained of. This was purely a question of fact for the jury to determine.

It is next objected that expert witnesses were permitted to testify that the pillar left between the rooms was not sufficient to support the roof and were asked, without stating all of the conditions and surroundings, what thickness the pillar should have been required to support the roof. Some of these witnesses, if not all of them, had personal knowledge of the conditions surrounding the place and knowing such conditions could testify as to the effect without putting hypothetical questions. They are at least shown to have such knowledge as would justify an opinion as to the required width of a pillar to support the roof and the effect that a thinning of that pillar would have upon the roof, and these were the principal questions propounded to the witnesses. If a witness is shown to have personal knowledge of conditions it is wholly unnecessary to put such conditions as are within his personal knowledge in the question upon which an opinion is desired, and the position assumed by counsel that such questions tended to take away from the jury the determining of the proximate cause of the injury is not well taken. It has frequently been held by the Supreme and Appellate Courts of this State, that as the ordinary jurors are not acquainted with the mining business that it is proper to introduce experts for the purpose of giving their opinion upon matters coming within the peculiar knowledge of miners. They are experienced in this character of work and we can see no

necessarily, that the thinning of the pillars brought on a squeeze in this room which would have a tendency to produce pressure enough upon the face of the coal to push it down, or break it off when undercut, then the jury would be warranted in finding that appellant had been negligent in permitting such conditions to exist, and that such conditions caused the injury complained of. This was purely a question of fact for the jury to determine.

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reason why their evidence should not be received. In fact this contention is well sustained by the decision of our Supreme Court in the case of Henrietta Coal Co. vs. Campbell, 211 Ill., 227, it is said, "Certain questions were asked of expert xxixx miners as to whether in their judgment certain conditions as to the roadway rendered it safe or otherwise, and it is claimed this was error as the subject was one within the common observation of all men. We cannot say such was the case. The roadways and entries of a mine and their adaptability to the use intended are not matters of common knowledge, and we perceive no error in admitting the character of evidence here objected to." See also Donk Bros. Coal & Coke Co. vs. Stroff, 200 Ill., 483. Jacobs vs. Madison Coal Corporation - 165 App.,444. We do not believe that the court committed any error in the admission of this evidence.

Counsel for appellant contends that the whole series of appellee's instructions, even though they are of a general character, do not lay down correctly the propositions of law that are applicable to the facts in this case. No reasons have been pointed out as to why the propositions of law laid down by the court are not correct and we are unable to say that any error exists in this ~~record~~ regard.

It is complained that the jury failed to follow defendant's sixth instruction, and we presume this was because the jury did not agree with the contention of appellant that appellee had contributed to the injury.

Complaint is also made of the modification of appellant's fifteenth and sixteenth instructions. The instructions, especially the fifteenth, as presented, was not correct as it should have limited the falling of the coal alone to its being under-cut with a machine, which it did not do; and the same principle may

reason why their evidence should not be received. In fact this contention is well sustained by the decision of our Supreme Court in the case of Kentucky Coal Co. vs. Campbell, 211 Ill., 297. It is said, "Certain questions were asked of expert mining men as to whether in their judgment certain conditions on the roadway rendered it safe or otherwise, and it is claimed this was error as the subject was one within the common observation of all men. We cannot say such was the case. The roadways and entries of a mine and their adaptability to the use intended are not matters of common knowledge, and we perceive no error in admitting the character of evidence here objected to." See also Cook Bros. Coal & Coke Co. vs. Ritroff, 200 Ill., 402. Jacobs vs. Madison Coal Corporation - 165 App.,444. We do not believe that the court committed any error in the admission of this evidence.

Counsel for appellant contends that the whole series of appellee's instructions, even though they are of a general character, do not lay down correctly the propositions of law that are applicable to the facts in this case. No reasons have been pointed out as to why the propositions of law laid down by the court are not correct and we are unable to say that any error exists in this regard.

It is complained that the jury failed to follow defendant's sixth instruction, and we presume this was because the jury did not agree with the contention of appellant that appellee had contributed to the injury.

Complaint is also made of the modification of appellant's fifteenth and sixteenth instructions. The instructions, especially the fifteenth, as presented, was not correct as it should have limited the falling of the coal alone to its being under-cut with a machine, which it did not do; and the same principle may

apply to instruction sixteen, and even though there may have been error in the effort of the court to limit these instructions in their effect, it could not work a reversal.

The defendant's refused instructions numbers one and two were properly refused. They ignored entirely the question contended for by plaintiff, of the injury having been brought about by the acts of the defendant. The instruction should have been so framed as not to have excused the defendant because of any latent defects that may have been produced by its negligent acts. Besides, we think the jury were well and fully instructed upon what constituted negligence of the defendant and due care of the plaintiff.

The real question at issue in this case was one of fact, and while the evidence was somewhat conflicting, we cannot say that the verdict of the jury was manifestly against the weight of the evidence, and are of the opinion that the judgment should be affirmed.

JUDGMENT AFFIRMED.

(not to be reported in full.)

apply to instruction sixteen, and even though there may have been error in the effect of the court's plain error instruction in their effect, it could not work a reversal.

The defendant's refused instructions number six and ten were properly refused. They imposed validity the requisite was needed for by plaintiff, of the injury have been brought about by the acts of the defendant. The instructions should have been framed so as to have excluded the defendant's service of its latest delivery that may have been produced by its negligent acts. Besides, we think the jury were well and fully instructed upon such constituted negligence of the defendant and the care of the plaintiff.

The real question at issue in this case was one of fact, and while the evidence was somewhat conflicting, we cannot say that the verdict of the jury was manifestly against the weight of the evidence, and are of the opinion that the judgment should be affirmed.

JUDGMENT AFFIRMED.

(not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1 8th day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 512

989

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Haller

vs.

No. 51

October Term, 1913.

Wasson Coal Co

~~ERROR TO~~
APPEAL FROM

186 I.A. 512

City COURT

Harrisburg ~~COUNTY~~

TRIAL JUDGE

Hon. A. E. Dominick

Term No. 51. Agenda No. 33.

October Term, A. D. 1913.

Martin Hollo, Appellee, vs. Wasson Coal Company, Appellant.	Appeal from the City Court of Harrisburg.

McBride, P.J.

Appellee recovered a judgment against appellant in the city court of Harrisburg, Illinois, for two thousand dollars, from which the appellant prosecutes this appeal.

The appellee was helper to one Mike Kando, who was engaged in operating a machine for under-cutting the coal in appellant's mine located in Saline County. They were engaged in work in under-cutting a "break through" from room six to room four, off of the fourth east entry off of the main south entry. This "break through" was started at the distance of about twenty-five feet from the face of the coal in room No. 6, and was of the width of about twenty-four feet and had been driven in the distance of about sixteen feet towards room No. 4. Appellee and the machine runner had commenced work upon this "break through" about ten days prior to the injury, and had made at least three runs or cuts and after the making of each cut they would move out the machine, the coal would be shot down and loaded out and then they would return and make another cut. On February 14, 1911, they were engaged at cutting the coal in this "break through" and after having worked therein for some time the roof of the room fell in and injured appellee.

It appears from the evidence that appellee and his buddy had examined the roof at and near the face of the "break through"

Term No. 51. Agenda No. 53.

October Term, A. D. 1913.

Martin Nolle, Appellee, vs. Wasson Coal Company, Appellant.	Appeal from the City Court of Harrisburg.

1914 A. 512

McBride, P.J.

Appellee recovered a judgment against appellant in the city court of Harrisburg, Illinois, for two thousand dollars, from which the appellant prosecutes this appeal.

The appellee was helper to one Mike Hando, who was engaged in operating a machine for under-cutting the coal in appellant's mine located in Saline County. They were engaged in work in under-cutting a "break through" from room six to room four, off of the fourth east entry off of the main south entry. This "break through" was started at the distance of about twenty-five feet from the face of the coal in room No. 6, and was of the width of about twenty-four feet and had been driven in the distance of about sixteen feet towards room No. 4. Appellee and the machine runner had commenced work upon this "break through" about ten days prior to the injury, and had made at least three runs or cuts and after the making of each cut they would move out the machine, the coal would be shot down and loaded out and then they would return and make another cut. On February 14, 1911, they were engaged at cutting the coal in this "break through" and after having worked therein for some time the roof of the room fell in and injured appellee.

It appears from the evidence that appellee and his buddy had examined the roof at and near the face of the "break through"

at the time they commenced work upon this day, and that for the distance of four or five feet the roof was apparently safe but back the distance of ten to twenty feet the roof was apparently loose, drummy and unsafe. At the time of the injury the appellee was standing some five or six feet back from the face of the coal and his injury was caused by the falling in of the roof at and near where it had appeared to be loose. It appears that it was the custom in that mine, when occasion required, for the machine runners to set props. It is claimed by appellee that the roof of this place had been loose and drummy for several days; that they had ordered props of the length of five feet, which they claim was the proper length, to prop the roof; that appellant had failed to furnish these props. That the mine examiner of appellant had failed to observe the condition of this roof, and mark it as required by statute. Upon the other hand, it is claimed by appellant that when the mine examiner went into the "break through" on the morning of the day of the injury, that the place was safe, and that there were no dangerous conditions which could have been discovered and that no demand for props was ever made and that the injury was caused directly and proximately from the change of conditions accruing after appellant's mine examiner had been in the place, and that the appellee had participated in producing the conditions which led to his injury.

It appears from the evidence that there were two props in the room which were of the length of about six feet but could not be used for the propping of the roof. That the thickness of the vein was about five feet and appellee claims that an attempt had been made to use the props in the room but owing to their length they were not able to do so, and props of the length of five feet had been demanded. Appellant claims that they measured the distance from the roof to the bottom of the place and that it was

at the time they commenced work upon this day, and that for the distance of four or five feet the roof was apparently sole but back the distance of ten to twenty feet the roof was apparently loose, drummy and unsafe. At the time of the injury the appellee was standing some five or six feet back from the face of the coal and his injury was caused by the falling in of the roof at and near where it had appeared to be loose. It appears that it was the custom in that mine, when occasion required, for the machine runners to set props. It is claimed by appellee that the roof of this place had been loose and drummy for several days; that they had ordered props of the length of five feet, which they claim was the proper length, to prop the roof; that appellant had failed to furnish these props. That the mine examiner of appellant had failed to observe the condition of this roof, and work it as required by statute. Upon the other hand, it is claimed by appellant that when the mine ex-miner went into the "break through" on the morning of the day of the injury, that the place was safe, and that there were no dangerous conditions which could have been discovered and that no demand for props was ever made and that the injury was caused directly and proximately from the change of conditions occurring after appellant's mine examiner had been in the place, and that the appellee had participated in producing the conditions which led to his injury.

It appears from the evidence that there were two props in the room which were of the length of about six feet but could not be used for the propping of the roof. That the thickness of the vein was about five feet and appellee claims that an attempt had been made to use the props in the room but owing to their length they were not able to do so, and props of the length of five feet had been demanded. Appellant claims that they measured the distance from the roof to the bottom of the place and that it was

about five feet six inches but appellee contends that this is explained by the measurement having been made after the fall of the slate from the roof.

The evidence discloses that the bones between the knee and the ankle were broken and that appellee suffered a very serious injury and has been unable to perform any work from that day to the present, and that he is permanently injured.

The appellant in his argument contends that the court erred in refusing to direct a verdict for defendant and in not granting its motion for a new trial. In the argument made by counsel for appellant it is not contended that the evidence of appellee is not sufficient to warrant a verdict, if it were of a character to be relied upon, but his claim is that the evidence of appellee is unreliable, contradictory and inconsistent with other statements made by his witnesses and should not be allowed by this court to prevail over the evidence of the witnesses of appellant. No complaint is made of any error committed by the court upon the trial, except a general criticism upon some of the instructions, which will be hereafter considered. The declaration charged that the defendant wilfully failed to furnish props, and cross bars when demanded. That the defendant did not employ a licensed mine examiner and that the place where the injury occurred was dangerous and was not marked. That the defendant permitted appellee to enter his place to work while a dangerous condition existed therein. The evidence of the witnesses of appellee in this case, if believed by the jury, wassufficient to warrant the jury in returning a verdict in his behalf, which is practically conceded by counsel for appellant but it is insisted that on account of the contradictory and inconsistent character of the evidence the jury was not warranted in believing it.

The first criticism of appellant is, that the testimony of the witness Gabriel Solomon, is contradicted by his written

about five feet six inches but appellee contends that this is explained by the measurement having been made after the fall of the slate from the roof.

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The first criticism of appellant is, that the testimony of the witnesses Gabriel Salomon, is contradicted by his written

statement made to appellant shortly after the accident, wherein he states he did not see the accident; no particular statement made by the witness Solomon while upon the stand is pointed out as contradictory of this one. We have read his evidence and do not understand him to testify that he saw the accident. Counsel has failed to point out any other contradictory statement of this witness but proceeds to criticise the statement of Alex Tote, wherein he quotes the witness as saying "I remember what the condition of the roof was because the boys told me." The court, on request, would have stricken out this hearsay testimony and counsel having failed to ask that it be stricken cannot complain for the first time in this court that it was error. The same may be said of the criticism made of the witness Killerman.

It is also claimed by counsel for appellant that the demand for props, testifiedto by some of the witnesses, was made at the bar room and argues that a place of this character used for drinking was not the proper place for the transaction of such business. Counsel for appellee insist that the bar room referred to by the witnesses was not a place for drinking but it was merely a room in which bars of iron used in the mine were kept. We can see no reason why there should exist in the minds of counsel any uncertainty as to the place intended by the witnesses. It looks as if some one was trying to deceive and mislead this court in this matter. Such deception is wholly uncalled for and inexcusable. Whether the place was a saloon or place where bars of iron were kept, it appears from the evidence of plaintiff's witnesses that the promise was made to deliver the props, and if so, the place of demand would not be so important.

The facts with reference to the Company having discharged its duty in examining the place, ascertaining its condition and the cause of the injury were all matters proper to be determined by thejury. Nothing has been pointed out, other than the dis-

statement made to appellant shortly after the accident, wherein he states he did not see the accident; no particular statement made by the witness Solomon while upon the stand is pointed out as contradictory of this one. We have read his evidence and do not understand him to testify that he saw the accident. Counsel has failed to point out any other contradictory statement of this witness but proceeds to criticise the statement of Alex Tote, wherein he quotes the witness as saying "I remember what the condition of the roof was because the boys told me." The court, on request, would have stricken out this hearsay testimony and counsel having failed to ask that it be stricken cannot complain for the first time in this court that it was error. The same may be said of the criticism made of the witness Killerman.

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The facts with reference to the Company having discharged its duty in examining the place, ascertaining its condition and the cause of the injury were all matters proper to be determined by the jury. Nothing has been pointed out, either than the dis-

crepancies and contradictions above referred to by the counsel, showing why this verdict is against the weight of the evidence, and from a reading of the testimony we are not able to say that the verdict of the jury is manifestly against the weight of the evidence, and we can see no reason for disturbing its finding.

The criticism of appellee's first five instructions, that they are misleading, in this, that they do "not say that the defendant has been guilty of a wilful violation of the statute, it comes so nearly doing so that the jury are misled," this, as well as the specific criticism of the fifth instruction that its phraseology in stating that the contributory negligence is no defense to an action arising from a wilful violation of a statute, are not well taken. The claims made by counsel in his opening statement, that no demand had been made for props, and that no dangerous condition existed at the time the mine examiner examined the roof, were not insisted upon in the argument of the case but we have examined the testimony upon these questions and we find that it is conflicting. If the testimony of appellee's witnesses is to be believed, then a demand was made for props of the length of five feet, and were not furnished. The dangerous condition existing in the roofof this "break through" should have been observed by the mine examiner and marked as dangerous, and the appellee should not have been permitted to enter this place to work until the place had been made safe. While it is true that appellant's witnesses denied any demand ever having been made for props, denied that the dangerous condition had existed at the place where appellee was engaged at work, prior to the day of the injury, and that any necessity existed for marking the roof as dangerous, these were, however, questions upon which the testimony was conflicting and the jury would have been warranted in finding either way upon any of these propositions. Under the repeated decisions of this and the Supreme Court, where

crepancies and contradictions above referred to by the counsel, showing why this verdict is against the weight of the evidence, and from a reading of the testimony we are not able to say that the verdict of the jury is manifestly against the weight of the evidence, and we can see no reason for disturbing its finding.

The criticism of appellee's first five instructions, that they are misleading, in this, that they do "not say that the defendant has been guilty of a wilful violation of the statute, it comes so nearly doing so that the jury are misled," this, as well as the specific criticisms of the fifth instruction, that its phraseology in stating that the contributory negligence is no defense to an action arising from a wilful violation of a statute, are not well taken. The claims made by counsel in his summing statement, that no demand had been made for props, and that no dangerous condition existed at the time the mine examiner examined the roof, were not insisted upon in the argument of the case but we have examined the testimony upon these questions and we find that it is conflicting. If the testimony of appellee's witnesses is to be believed, then a demand was made for props of the length of five feet, and were not furnished. The dangerous condition existing in the roof of this "break through" should have been observed by the mine examiner and marked as dangerous, and the appellee should not have been permitted to enter this place to work until the place had been made safe. While it is true that appellant's witnesses denied any demand ever having been made for props, denied that the dangerous condition had existed at the place where appellee was engaged at work, prior to the day of the injury, and that any necessity existed for marking the roof as dangerous, these were, however, questions upon which the testimony was conflicting and the jury would have been warranted in finding either way upon any of these propositions. Under the repeated decisions of this and the Supreme Court, where

the evidence is so conflicting that a jury would be warranted in adopting the testimony of either of the parties, that under such circumstances the finding of the jury is conclusive, and the reviewing court would have no right to disturb its verdict.

We do not see that any reversible error has been committed in the trial of this cause and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reportedin full.)

the evidence is so conflicting that a jury would be warranted in adopting the testimony of either of the parties, that under such circumstances the finding of the jury is conclusive, and the reviewing court would have no right to disturb its verdict.

We do not see that any reversible error has been committed in the trial of this cause and the judgment of the lower court is affirmed.

[illegible]

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 514

990

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Duncan, et al
Commissioners &c

vs.

No. 56

October Term, 1913.

Fitch, et al
Commissioners &c

~~ERROR TO~~
APPEAL FROM

186 I.A. 514

Circuit **COURT**

Crawford **COUNTY**

TRIAL JUDGE

Hon. E. E. Newlin

Term No. 56. Agenda No. 18.

October Term, A. D. 1913.

Lowe C. Duncan, et al., Commissioners of Highways of the town of Montgomery, Appellees, vs. Frank Fitch, et al., Drainage Commissioners of the Birds Drainage District, Appellants.	Appeal from the Circuit Court of Crawford County.

McBride, P.J.

The appellees presented their petition to the Circuit Court of Crawford County for a writ of mandamus to compel the appellants to construct a bridge over a ditch that had been dug by the appellants across the highway in the drainage district then controlled by appellants. It appears from the petition that the ditch dug by the appellants was on the right of way of the C. V. & C. R. R. Co., and was of the width of thirty feet and of the depth of ten feet and was not cut in a natural water course or drain, and that by reason of the cutting of said ditch the said highway was rendered useless to the public and impassable to travel and that it will be necessary to construct a bridge across said ditch for public travel and that said public highway is one of the main travelledroads in the twon of Montgomery and that it would cost about one thousand dollars to construct such bridge. That frequent requests have been made upon the drainage commissioners to construct a sufficient bridge over said ditch and to restore the highway so it will be convenient for the use of the public travel and that said drainage commissioners have refused to erect a bridge and to put said highway in a good condition for travel. To this petition the appellants filed two pleas. The first says that the commissioners condemned the right of way over and across the lands of the C. V. & C. R. R. Company,

Term No. 56. Agenda No. 18.

October Term, A. D. 1913.

Lowe C. Duncan, et al., Commissioners of Highways of the town of Montgomery, Appellees, vs. Frank Fitch, et al., Drainage Commissioners of the Hinde Drainage District, Appellants.	Appeal from the Circuit Court of Crawford County.

McBride, J.

The appellees presented their petition to the Circuit Court of Crawford County for a writ of mandamus to compel the appellants to construct a bridge over a ditch that had been dug by the appellants across the highway in the drainage district then controlled by appellants. It appears from the petition that the ditch dug by the appellants was on the right of way of the C. V. & C. R. R. Co., and was of the width of thirty feet and of the depth of ten feet and was not cut in a natural water course or drain, and that by reason of the cutting of said ditch the said highway was rendered useless to the public and impassable to travel and that it will be necessary to construct a bridge across said ditch for public travel and that said public highway is one of the main travelroads in the town of Montgomery and that it would cost about one thousand dollars to construct such bridge. The frequent requests have been made upon the drainage commissioners to construct a sufficient bridge over said ditch and to restore the highway so it will be convenient for the use of the public travel and that said drainage commissioners have refused to erect a bridge and to put said highway in a good condition for travel. To this petition the appellants filed two pleas. The first says that the commissioners condemned the right of way over and across the lands of the C. V. & C. R. R. Company,

through Sections 17 and 20, in the town of Montgomery, over and across the highway where it crosses said railroad right of way and that they caused to be constructed their ditch in said drainage district over and along the right of way as condemned against said railroad company, and that by virtue of said judgment and condemnation they had a right to dig said ditch on the payment of the sum found to be due the Railroad Company for the right of way and that said Railroad Company is required to build and maintain the necessary crossings for highways over and across their right of way, which defendants were ready to verify. To this plea a demurrer was interposed, and, as we think, properly sustained by the court. The drainage commissioners having dug a ditch across the highway, not in a water course, are required under the law to build a bridge sufficient for the convenience of public travel over said ditch and to restore the highway. Commissioners of Highways of the town of Bement vs. Com. of Lake Fork Special Drainage Dist., 246 Ill., 388. People, etc., vs. Fenton & Thomson R. R. Co., 252 Ill., 372. Even though the appellants had condemned the right of way as to the Railroad Company, and had paid to such Railroad Company the damages assessed, this would not excuse the appellants from the performance of the duties required of the drainage district, nor does it appear from this plea that the bridge in question was across its railroad or was of the character which the law required the Railroad Company to build.

The second plea of appellants avers an agreement between the appellees and appellants whereby they agreed upon an assessment of benefits in the sum of fifty dollars, and that in addition thereto the appellees were to construct and maintain the bridge over and across the ditch in question. The plea then avers that in pursuance of said agreement the appellees constructed and are now maintaining a bridge across said ditch where the said High-

through Sections 17 and 20, in the town of Montgomery, over and across the highway where it crosses said railroad right of way and that they caused to be constructed their ditch in said drainage district over and along the right of way so condemned against said railroad company, and that by virtue of said judgment and condemnation they had a right to dig said ditch on the payment of the sum found to be due the Railroad Company for the right of way and that said Railroad Company is required to build and maintain the necessary crossings for highways over and across their right of way, which defendants were ready to verify.

This plea a demurrer was interposed, and, as we think, properly sustained by the court. The drainage commissioners having dug a ditch across the highway, not in a water course, are required under the law to build a bridge sufficient for the convenience of public travel over said ditch and to restore the highway. Commissioners of Highways of the town of Tremont vs. Cen. of Lake Fork Special Drainage Dist., 246 Ill., 588. People, etc., vs. Benton & Thomson R. R. Co., 252 Ill., 372. Even though the appellants had condemned the right of way as to the Railroad Company, and had paid to such Railroad Company the damages assessed, this would not excuse the appellants from the performance of the duties required of the drainage district, nor does it appear from this plea that the bridge in question was across its railroad or was of the character which the law required the Railroad Company to build.

The second plea of appellants avers an agreement between the appellees and appellants whereby they agreed upon an assessment of benefits in the sum of fifty dollars, and that in addition thereto the appellees were to construct and maintain the bridge over and across the ditch in question. The plea then avers that in pursuance of said agreement the appellees constructed and are now maintaining a bridge across said ditch where the said high-

way crosses the same, which bridge furnishes ample facilities and conveniences for the public travel. To this plea appellees also filed a demurrer which was sustained by the court.

We agree with the contention of counsel for appellees that as this duty devolved by law upon the drainage district to construct the bridge that the commissioners of highways would have no right to make a contract assuming this burden, and would have no right to levy a tax to build such a bridge. People,etc, vs. Fenton and Thomson R. R. Co., (Supra). If this were all the plea contained we would have no difficulty in finding that the court was justified in sustaining the demurrer to the plea, but the plea further says that the appellees had constructed and were now maintaining a bridge across said ditch where the said highway crosses the same, "which bridge furnishes ample facilities and conveniences for the public travel." If it is true that there exists across and over said ditch a bridge which furnishes ample facilities and conveniences for the public travel, then why the necessity of the court compelling by mandamus the appellants or any one else to expend a large amount of money in building a bridge that is unnecessary? A writ of mandamus is not granted except where a clear right is shown and rests in sound judicial discretion, and the court, in the exercise of such discretion, would not require a drainage district to expend one thousand dollars in the building of a bridge when no necessity existed therefor. If a bridge sufficient for the public travel had been built, and was then in existence, how can it be said that a clear right to have the relief prayed for would exist, and this is necessary before the writ would be granted. People,etc., vs. The Mayor, etc., 51 Ill., 17. The fact that the bridge may have been built and maintained by the appellees, as averred in the plea, could make no difference even though the appellees were not bound to build it. The principal and controlling question is,

may crossed the same, which bridge furnishes ample facilities and conveniences for the public travel. To this plea appellees also filed a demurrer which was sustained by the court.

We agree with the contention of counsel for appellees that as this duty devolved by law upon the drainage district to construct the bridge that the commissioners of drainage would have no right to make a contract assuming this burden, and would have no right to levy a tax to build such a bridge. People, ex rel. Ventom and Thomson v. R. Co., (Supra). If this were all the plea contained we would have no difficulty in finding that the court was justified in sustaining the demurrer to the plea, but the plea further says that the appellees had constructed and were now maintaining a bridge across said ditch where the said highway crosses the same, "which bridge furnishes ample facilities and conveniences for the public travel." If it is true that there exists across and over said ditch a bridge which furnishes ample facilities and conveniences for the public travel, then why the necessity of the court compelling by mandamus the appellants or any one else to expend a large amount of money to building a bridge that is unnecessary? A writ of mandamus is not granted except where a clear right is shown and where in sound judicial discretion, and the court, in the exercise of such discretion, would not require a drainage district to expend one thousand dollars in the building of a bridge when no necessity existed therefor. If a bridge sufficient for the public travel had been built, and was then in existence, how can it be said that a clear right to have the relief prayed for would exist, and this is necessary before the writ would be granted. People, etc., v. The Mayor, etc., 51 Ill., 17. The fact that the bridge may have been built and maintained by the appellees, as averred in the plea, could make no difference even though the appellees were not bound to build it. The principal and controlling question is,

did the appellants dig a ditch across this highway and is there such a bridge there as to furnish ample facilities and conveniences for public travel? If there is not, then a bridge should be constructed and if there is then no necessity exists for such a bridge.

We think that the Court should have required an issue to be formed upon this question and then determine by trial as to whether or not such a bridge in fact exists.

We are of opinion that the court erred in sustaining the demurrer to the second plea, for reasons above stated, and that the judgment of the Circuit Court should be reversed and remanded with directions to overrule the demurrer to the plea and require an issue to be formed upon the questions suggested as presented by such plea.

REVERSED AND REMANDED WITH DIRECTIONS.

(Not to be reported in full.)

did the appellants use a ditch across this highway and is there such a bridge there as to furnish ample facilities and convenience for public travel? If there is not, then a bridge should be constructed and if there is then no necessity exists for such a bridge.

We think that the Court should have required an issue to be formed upon this question and then determine by trial as to whether or not such a bridge in fact exists.

We are of opinion that the court erred in sustaining the demurrer to the second plea, for reasons above stated, and that the judgment of the Circuit Court should be reversed and remanded with directions to overrule the demurrer to the plea and require an issue to be formed upon the questions suggested as presented by such plea.

REVERSED AND REMANDED WITH DIRECTIONS.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 Ill. App. 531

186 A 531

794

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the [illegible]e being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Jackson

vs.

No. 9

October Term, 1913.

T St L & W R R Co

~~ERROR TO~~
APPEAL FROM

186 I.A. 531

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

Hon. A M Rose

Docket No. 9. Agenda No. 3.

October Term, A. D. 1913.

Frank Jackson, Appellee,	)	
v.	)	Appeal from Circuit Court of Fayette County.
Toledo, St. Louis & Western Railroad Company, Appellant.	)	

186 I.A. 531

Opinion by Harris, J.

The facts in this case so far as material to issue before this Court appear to be as follows:

There was on the 18th day of May, 1911, pending in the circuit court of Fayette County the case of appellee against appellant in which said suit petitioner was attorney for appellee, and on the following day F. M. Guinn as such attorney for appellee, delivered to C. E. Pope, Attorney for appellant, a notice of his employment by appellee and the terms of employment, signed F. M. Guinn.

The appellee's claim in so far as he was personally interested in and by said suit was compromised and settled between the parties on the 16th day of December, 1911, for $125.00.

That at the February Term, 1913, a petition and amendment to petition were filed in said cause to which the answer of appellant was filed.

That at the May Term a hearing was had upon a petition, amendments, answer and motion of appellee. The Court sustained motion and prayer of petition and entered judgment accordingly for the sum of $62.50 Attorney's fees.

The contention of appellant is that the notice is insufficient in form and substance, and that there was no proper service of said notice upon appellant.

The statute of this state (laws 1909 p.97) provide: "Such

D-docket No. 9. Agenda No. 3.

October Term, A. D. 1913.

Frank Lawson, Appellee,	
V.	Appeal from Circuit Court of Fayette County.
Toledo, St. Louis & Western Railroad Company, Appellant.	

Opinion by Harris, J.

The facts in this case so far as material to issue before this Court appear to be as follows:

There was on the 18th day of May, 1911, pending in the circuit court of Fayette County the case of appellee against appellant in which said suit petitioner was attorney for appellee, and on the following day K. K. Quinn as such attorney for appellee, delivered to C. K. Pope, Attorney for appellant, a notice of his employment by appellee and the terms of employment, signed F. K. Quinn.

The appellee's claim in so far as he was personally interested in and by said suit was compromised and settled between the parties on the 16th day of December, 1911, for $175.00.

That at the February Term, 1913, a motion and amendment to petition were filed in said cause to which the answer of appellant was filed.

That at the May Term a hearing was had upon a petition, and amendment, answer and motion of appellee. The Court sustained motion and prayer of petition and entered judgment accordingly for the sum of $62.50 Attorney's fees.

The contention of appellant is that the notice is insufficient in form and substance, and that there was no proper service of said notice upon appellant.

The statute of this state (Laws 1909 p.97) provides: "Such

attorneys shall serve notice in writing upon the parties against whom their clients have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suit, etc. This statute upon the question here involved has been construed by our Supreme Court in case of Haj vs. American Bottle Co., 261 Ill., 362. The Court say: "The statute creating attorney's lien creates a liability unknown before the passage of the act, and where that is the case the statute must be strictly followed. The general rule in regard to service of process or legal notice is, that it must be served personally on the party or the individual in question, unless some other mode is specially provided for that purpose by statute or has been otherwise established by long and recognized practice to the contrary."

If personal service is required, the statute says, upon the party against whom his client may have the suit or claim would certainly mean that party against whom summons would issue, and notice personally served on said party should follow the law as to service of process as to the proper individual where the party is a corporation.

There being no service of notice in this case the notice offered in evidence for want of showing a proper service was incompetent and it is not necessary to discuss the other errors assigned. Without the service of notice as provided by law, the claim of appellee having been before that time compromised and settled, the petitioner could not recover.

The judgment of the Circuit Court is therefore reversed with following finding of fact to be entered as a part of the judgment:

That no proper notice was served by petitioner upon appellant prior to filing of his petition.

Reversed.

(Not to be reported in full.)

attorneys shall serve notice in writing upon the writer, against whom their clients have such rights, claims or causes of action, claiming such lien and stating therein the interest they have in such suit, etc. This statute upon the question here involved has been construed by our Supreme Court in case of Hay vs. American Bottle Co., 221 111., 327. The Court say: "The statute requiring attorney's lien creates a liability unknown before the passage of the act, and where that is the case the statute must be strictly followed. The general rule in regard to service of process or legal notice is, that it must be served personally on the party or the individual in question, unless some other mode is specially provided for that purpose by statute or has been otherwise established by long and recognized practice to the contrary."

If personal service is required, the statute says, when the party against whom his client may have the suit or claim would certainly mean that party against whom summons would issue, and notice personally served on such party should follow the law as to service of process as to the proper individual where the party is a corporation.

There being no service of notice in this case the notice offered in evidence for want of showing a proper service was incompetent and it is not necessary to discuss the other errors assigned. Without the service of notice as provided by law, the claim of appellee having been before that time compromised and settled, the petitioner could not recover.

The judgment of the Circuit Court is therefore reversed with following finding of fact to be entered as a part of the judgment:

That no proper notice was served by petitioner upon respondent prior to filing of his petition.

Reversed.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.* A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $ . . _____

186 A 532

915

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred ond fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Harding & Miller

vs.

No. 20

October Term, 1913.

Thorpe

186 I.A. 532

~~ERROR TO~~
APPEAL FROM

Circuit **COURT**

Wabash **COUNTY**

TRIAL JUDGE

Hon. W. H. Green

Term No. 20. Agenda No. 22.

October Term, A. D. 1913.

Harding & Miller, Corporation, Appellee, v. C. A. Sharpe, Appellant.	Appeal from the Circuit Court of Wabash County.

Opinion by Harris, J.

Appellee brought suit in replevin to recover from appellant the possession of certain piano stool and scarf and filed a declaration consisting of two counts charging an unlawful taking and unjustly detaining the same to which appellant filed the pleas of non detinuet, non cepit, and property in appellant upon the filing of replications issue was joined a trial by jury a verdict and judgment finding the right of property to be in appellee.

The undisputed facts in this case as they appear from the record are: That on the third day of August, 1911, appellee, through their agent sold and delivered to Mrs. Laura L. Miller and Harry S. Miller the property in question for the sum of $350.00 and received from them their obligation to pay for same by installments which were never paid. That on the fourth day of December, 1911, appellant made a loan of $97.35 to said Harry S. Miller and Laura L. Miller and took from them a chattel mortgage upon the property inquestion, which said mortgage was filed for record on the 25th day of April, 1912. That after different visits and attempts by agent of appellee to obtain payment or security from the Millers for the property in question he took possession under the obligation of purchase from the Millers of the property on 23rd day of April, 1912, and delivered to them their obligation.

October Term, A. D. 1912.

Martin A. Miller, Appellee,	
Appellee,	
v.	Appeal from the Circuit Court of Webster County.
C. A. Sharer,	
A partner.	

Opinion by Harris, J.

Appellee brought suit in replevin to recover from appellant the possession of certain piano stool and scarf and filed a declaration consisting of two counts charging an unlawful taking and unlawfully detaining the same to which appellant filed the plaea of non detinuet, non cepit, and property in appellant upon the filing of replications issue was joined a trial by jury a verdict and judgment finding the right of property in appellee.

The undisputed facts in this case as they appear from the record are: That on the third day of August, 1911, appellee, through their agent sold and delivered to Mr. Laura T. Miller and Harry S. Miller the property in question for the sum of $380.00 and received from them their obligation to pay for same by installments which were never paid. That on the fourth day of December, 1911, appellant made a loan of $97.35 to said Harry S. Miller and Laura L. Miller and took from them a chattel mortgage upon the property in question, which said mortgage was filed for record on the 28th day of April, 1912. That after different visits and attempts by agent of appellee to obtain payment or security from the Millers for the property in question he took possession under the obligation of purchase from the Millers of the property on 23rd day of April, 1912, and delivered to them their obligation.

At the time of beginning this suit it appears the possession of the property was in appellant and was replevied from him.

The contentions of appellant as to the law of chattel mortgages when valid or void do not apply to this case. It may be conceded that on the 25th day of April, 1912, when appellee took possession of the property in question neither appellant not appellee had under the law a valid lien or mortgage as against other lien holders who had protected their liens under the law. However, both instruments although void under the law as to bona fide lien holders were good and binding as between the parties thereto.

This being the condition of this record on the 25th day of April, 1912, and appellee having a right, as between themselves and the Millers, to take this property and on that day having taken it into their possession, the appellant was not ina position to complain.

The assignment that Mrs. Miller claims to have made of an interest in a relative's estate and which she says was accepted by appellant and appellant says was conditionally accepted was at the time of taking property returned to her, accepted by her and she has since received the money due her from said estate.

There was no error in the trial or in judgment entered in this case.

AFFIRMED.

&&&&&&&&&&&&&&

(Not to be reported in full.)

At the time of beginning this suit it appears the possession of the property was in appellant and was replevied from him.

The contentions of appellant as to the law of chattel mortgages when valid or void do not apply to this case. It may be conceded that on the 25th day of April, 1912, when appellee took possession of the property in question neither appellant nor appellee had under the law a valid lien or mortgage as against other lien holders who had protected their liens under the law. However, both instruments although void under the law as to bona fide lien holders were good and binding as between the parties thereto.

This being the condition of this record on the 25th day of April, 1912, and appellee having a right, as between themselves and the Miller, to take this property and on that day having taken it into their possession, the appellant was not in position to complain.

The assignment that Mrs. Miller claims to have made of an interest in a relative's estate and which she says was accepted by appellant and appellant says was conditionally accepted was at the time of taking property returned to her, accepted by her and she has since received the money due her from said estate.

There was no error in the trial or in judgment entered in this case.

AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $.

186 I.A. 533

96

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Halbert, adm
Noonan, Dec'd

vs.

No. 21

October Term, 1913.

Traders Live Stock Exchg

~~ERROR TO~~
APPEAL FROM

186 I.A. 533

City COURT

E. St Louis ~~COUNTY~~

TRIAL JUDGE

Hon. R. S. Flannigan

Term No. 24. Agenda No. 7.

October Term, 1913.

William U. Halbert, Administrator of the Estate of Frank Moonan, deceased, Appellee, vs. Trader's Live Stock Exchange, Appellant.	Appeal from the City Court of East St. Louis.

186 I.A. 533

Opinion by Harris, J.

This case was before this Court at the March Term, 1912, reported in Volume 173 App., p. 229.

A statement of the allegations of the bill and the sufficiency of the allegations were before this Court at that time and appear in the opinion. The further proceedings in said cause were upon the filing of the remanding order in the Court below at the November Term, 1912, former decree was vacated, and demurrer to bill overruled. Appellant answering bill admits the death of Frank Moonan. Appellee's appointment and qualification as administrator. The membership and good standing of Frank Moonan at the time of his death in appellant's Exchange. The issuing of the certificate of membership to Frank Moonan. The by-laws of appellant Exchange, and that they were in force and effect at the time of the death of Frank Moonan. That appellant obtained possession of said certificate after the death of said Frank Moonan and caused the same to be cancelled according to the by-laws governing said association.

The answer denies that Frank Moonan ever paid into the treasury of such association the sum of $500.00. Denies Frank Moonan was at the time of his death the owner and in possession of the certificate. Denies that all fines had been paid. Denies that any forfeiture or assignment thereof had been made; denies that appellee became entitled to possession of the certificate

Term No. 24. Agenda No. 7.

October Term, 1913.

William G. Halbert, Administrator of the Estate of Frank Noonan, deceased, Appellee,	Appeal from the City Court of East St.Louis.
vs.	
Traders Live Stock Exchange, Appellant.	

186 I.A. 533

Opinion by Harris,J.

This case was before this Court at the March Term, 1913, reported in Volume 173 App., p. 229.

A statement of the allegations of the bill and the sufficiency of the allegations were before this Court at that time and appear in the opinion. The further proceedings in said cause were upon the filing of the remanding order in the Court below at the November Term, 1913, former decree was vacated, and demurrer to bill overruled. Appellant answering bill admits the death of Frank Noonan. Appellee's appointment and qualification as administrator. The membership and good standing of Frank Noonan at the time of his death in appellant's Exchange. The issuing of the certificate of membership to Frank Noonan. The by-laws of appellant Exchange, and that they were in force and effect at the time of the death of Frank Noonan. That appellant obtained possession of said certificate after the death of said Frank Noonan and caused the same to be cancelled according to the by-laws governing said association.

The answer denies that Frank Noonan ever paid into the treasury of such association the sum of $500.00. Denies Frank Noonan was at the time of his death the owner and in possession of the certificate. Denies that all fines had been paid. Denies that any forfeiture or assignment thereof had been made, denies that appellee became entitled to possession of the certificate

or the value thereof. Denies that valid claims amounting to $300.00 have been presented for allowance against the estate of Frank Moonan, deceased.

Answer admits having certain funds in the treasury of appellant held for purposes of association. Denies that appellant is guilty of any wrongful act or fraud.

To the answer appellee filedreplication, cause referred to Master, upon evidence heard by Master and exhibits offered the Master makes report of evidence and findings, objections of appellant to Master's finding to Court, and upon the hearing of the objections standing as exceptions to the Master's report were by the Court overruled. Decree entered finding in substance that the material allegations of the bill had been proven, and that the appellee was entitled to the relief prayed for in the bill.

The exceptions to the Master's report and the assignment of errors by appellant we may group under two propositions, the decision of which controls and disposes of all other questions raised under the assignment of errors.

Lst. The allegations of the bill giving the Court jurisdiction of the subject matter have not been proven.

2nd. The facts proven do not support the decree entered.

The argument upon the question of jurisdiction proceeds upon the theory that there was a remedy at law, in so far as the sufficiency of the averments of the bill are concerned, was disposed of in the former opinion of this Court. It is now a question whether, from the facts proven, it is a case where the Court, for its own protection, should raise of its own motion the question of the jurisdiction of the subject matter, and if it did not do so the judgment that followed would be a nullity. We do not think the facts put this case in line with the authorities cited by counsel as a case of that class. Then under the conten-

or the value thereof. Denies that valid claims amounting to $300.00 have been presented for allowance against the estate of Frank Moonan, deceased.

Answer admits having certain funds in the treasury of appellant held for purposes of association. Denies that appellant is guilty of any wrongful act or fraud.

To the answer appellee filed replication, cause referred to Master, upon evidence heard by Master and exhibits offered the Master makes report of evidence and findings, objections of appellant to Master's finding to Court, and upon the hearing of the objections standing as exceptions to the Master's report were by the Court overruled. Decree entered finding in substance that the material allegations of the bill had been proven, and that the appellee was entitled to the relief prayed for in the bill.

The exceptions to the Master's report and the assignment of errors by appellant we may group under two propositions, the decision of which controls and disposes of all other questions raised under the assignment of errors.

1st. The allegations of the bill giving the Court jurisdiction of the subject matter have not been proven.

2nd. The facts proven do not support the decree entered.

The argument upon the question of jurisdiction proceeds upon the theory that there was a remedy at law, in so far as the sufficiency of the averments of the bill are concerned, was disposed of in the former opinion of this Court. It is now a question whether, from the facts proven, it is a case where the Court, for its own protection, should raise of its own motion the question of the jurisdiction of the subject matter, and if it did not do so the judgment that followed would be a nullity. We do not think the facts put this case in line with the authorities cited by counsel as a case of that class. They under the circum-

tion made it belongs to that class of cases where throughout the entire proceedings and at every stage thereof the appellant may challenge the jurisdiction of the Court of subject matter, and if he does not do so it must be considered by the Court as having been by appellant waived. (Phillips vs. Renfield, 240 Ill., 141.) (Shedd vs. Seefeld, 126 App., 383.)

The appellant fiées an answer in this case in which the jurisdiction of the Court as to the subject matteris not called to the attention of the Court, and after the hearing of the evidence the question of there being a remedy at law is only raised by the question that there is not sufficient evidence to support the bill on jurisdictional matters, so upon that objection alone must the rights of appellant be determined. Whatever is admitted by the answer waives the necessity of proof by appellee. That appellee is the proper party to bring suit. That deceased Frank Noonan was at the time of his decease a member in good standing of appellant's Exchange. That the certificate was issued to him and after his death under the by-laws cancelled by appellant, and the value thereof paid to other than the legal representative of his estate.

We are satisfied when these admissions are taken into consideration with the proof in this case there is at least prima facie evidence to support the allegations of the bill, and there being no evidence offered by the appellant to the contrary, the decree entered in said cause is supported by the evidence in the case.

It is not material in so far as the right of appelleeto maintain this suit is concerned whether claims had been presented, filed and allowed against the estate of Frank Noonan. The appellee under the law was given possession of all personal property owned and possessed by the deceased at the time of his death.

There being no reversible error the judgment and decree will therefore be affirmed.

Affirmed.

(Not to be reported in full.)

tion made it belongs to that class of cases where throughout the entire proceedings and at every stage thereof the appellant may challenge the jurisdiction of the Court of subject matter, and if he does not do so it must be considered by the Court as having been by appellant waived. (Phillips vs. Deerfield, 226 Ill., 141.) (Shedd vs. Seefeld, 120 App., 382.)

The appellant files an answer in this case in which the jurisdiction of the Court as to the subject matter is not called to the attention of the Court, and after the hearing of the evidence the question of there being a remedy at law is only raised by the question that there is not sufficient evidence to support the bill on jurisdictional matter, so upon that distinction alone must the rights of appellant be determined. Whatever is admitted by the answer waives the necessity of proof by appellee. That appellee is the proper party to bring suit. That deceased Frank Moonan was at the time of his decease a member in good standing of appellant's Exchange. That the certificate was issued to him and after his death under the by-laws cancelled by appellant, and the value thereof paid to other than the legal representative of his estate.

We are satisfied when these admissions are taken into consideration with the proof in this case there is at least prima facie evidence to support the allegations of the bill, and there being no evidence offered by the appellant to the contrary, the decree entered in said cause is supported by the evidence in the case.

It is not material in so far as the right of appellee maintain this suit is concerned whether claims had been presented, filed and allowed against the estate of Frank Moonan. The appellee under the law was given possession of all personal property owned and possessed by the deceased at the time of his death.

There being no reversible error the judgment and decree will therefore be affirmed.

Affirmed.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $.....

186 A 540

918

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Smith

vs.

No. 34

October Term, 1913.

Smith

~~ERROR TO~~
APPEAL FROM

186 I.A. 540

Circuit **COURT**

Clinton **COUNTY**

TRIAL JUDGE

Hon. Thos M. Jett

Term No. 34. Agenda No. 19.

October Term, 1913.

Mellie Smith, Appellant,	)	
vs.	)	Appeal from Clinton County.
Alfreda Smith, Appellee.	)	

Opinion by Harris, J.

The facts in this case as they appear from the bill, answer and evidence of appellant and appellee may be briefly stated, as follows:

That on the 13th day of January, 1867, appellee was married to one William R. Smith and lived with him for ten years. That at the November Term, 1880, of the circuit court of Clinton County the said William R. Smith, upon a hearing in open court was given a decree for divorce from appellee. That on the 8th day of March, 1883, the said William R. Smith was married to appellant, with whom he lived for twenty-seven years. That at the November Term, 1905, of the circuit court of Clinton County a decree was entered in favor of appellee and against William R. Smith reviewing the proceedings and setting aside the decree entered at the November Term, 1880, of said Court giving William R. Smith a divorce. Appellant learned in 1904 that William R. Smith had been previously married to Alfreda Hall; that William R. Smith was a soldier drawing a pension, and after proceedings had in 1905, annulling the decree appellee drew one-half of his pension from the United States Government from that time, to his death, May 15, 1910; that after the death of William R. Smith, in an effort to file pension claim, appellant learns of former wife and widow and appellee learns for the first

Term No. 34. Agenda No. 13.

October Term, 1913.

Nellie Smith, Appellant,	
vs.	Appeal from Clinton County.
Alfreda Smith, Appellee.	

185 I.A. 540

Opinion by Harris, J.

The facts in this case as they appear from the bill, answer and evidence of appellant and appellee may be briefly stated, as follows:

That on the 13th day of January, 1867, appellee was married to one William R. Smith and lived with him for ten years. That at the November Term, 1880, of the circuit court of Clinton County the said William R. Smith, upon a hearing in open court was given a decree for divorce from appellee. That on the 8th day of March, 1883, the said William R. Smith was married to appellant, with whom he lived for twenty-seven years. That at the November Term, 1905, of the circuit court of Clinton County a decree was entered in favor of appellee and against William R. Smith reviewing the proceedings and setting aside the decree entered at the November Term, 1880, of said Court giving William R. Smith a divorce. Appellant learned in 1904 that William R. Smith had been previously married to Alfreda Hall; that William R. Smith was a soldier drawing a pension, and after proceedings had in 1905, annulling the decree appellee drew one-half of his pension from the United States Government from that time, to his death, May 15, 1910; that after the death of William R. Smith, in an effort to file pension claim, appellant learns of former wife and widow and appellee learns for the first

time of the marriage of her husband to appellant.

That at the September Term, 1912, of the circuit court of Clinton County appellant files her bill for review and relief against appellee. The relief asked for by appellant is the annulling and setting aside of the decree entered by said Court in 1905 in the case of Alfreda Smith vs. William R. Smith, and for the entering of a decree nunc pro tunc of divorce in the proceedings at the November Term, 1880, of said court in the case of William R. Smith vs. Alfreda Smith.

The only allegation in the bill to excuse either appellant or deceased husband from laches is that he was in poor health for the last six years of his lifetime and that they were without property or means, and that since the death of William R. Smith appellant has been compelled to make her living by day's work. The residence of appellant at the time of bringing this suit was Harwood, Missouri. The residence of appellee was Kenosha, Wisconsin. They were aged 54 and 66 years respectively.

The record of undisputed facts in this case is the best reason why legislatures and courts have adopted laws and rules of construction favoring the termination of law suits.

Appellant was neither a necessary or proper party to the former litigation between Alfreda Smith and her husband William R. Smith, and therefore was not at the time of filing her said bill within the law.a party entitled to the review of the former proceedings.

Appellant failed in her said bill to aver any good, sufficient and cogent reason or excuse for laches on the part of her said husband or herself for the delay in filing said bill and equity will not afford its aid in enforcing her demands unless it is apparent from the record that there are cogent and convincing reasons given for such delay.

Courts of equity will not set aside a decree on the ground

time of the marriage of her husband to appellant.

That at the September Term, 1912, of the circuit court of Clinton County appellant files her bill for review and relief against appellee. The relief asked for by appellant is the annulling and setting aside of the decree entered by said Court in 1905 in the case of Alfreda Smith vs. William R. Smith, and for the entering of a decree nunc pro tunc of divorce in the proceedings at the November Term, 1880, of said court in the case of William R. Smith vs. Alfreda Smith.

The only allegation in the bill to excuse either appellant or deceased husband from laches is that he was in poor health for the last six years of his lifetime and that they were without property or means, and that since the death of William R. Smith appellant has been compelled to make her living by day's work. The residence of appellant at the time of bringing this suit was Harwood, Missouri. The residence of appellee was Kenosha, Wisconsin. They were aged 54 and 66 years respectively.

The record of undisputed facts in this case is the best reason why legislatures and courts have adopted laws and rules of construction favoring the termination of law suits.

Appellant was neither a necessary or proper party to the former litigation between Alfreda Smith and her husband William R. Smith, and therefore was not at the time of filing her said bill within the law's party entitled to the review of the former proceedings.

Appellant failed in her said bill to aver any good, sufficient and cogent reason or excuse for laches on the part of her said husband or herself for the delay in filing said bill and equity will not afford its aid in enforcing her demands unless it is apparent from the record that there are cogent and convincing reasons given for such delay.

Courts of equity will not set aside a decree on the ground

that it was obtained by false evidence but only for fraud, which gives the court colorable jurisdiction, and under the averments of the acts of fraud not conclusions clear and satisfactory proof thereof must appear to the Court before a decree should be set aside.

Our statute makes a decree after three years binding on the parties and all persons claiming under them by virtue of any act done subsequent to the commencement of such suit.

The judgment of the Circuit Court in dismissing the bill forwant of equity wasright and it will be affirmed.

Affirmed.

(Not to be reported in full.)

that it was obtained by false evidence but only for fraud, which gives the court equitable jurisdiction, and under the evidence of the acts of fraud not conclusive clear and satisfactory proof thereof must appear to the Court before a decree should be set aside.

Our statute makes a decree after three years binding on the parties and all persons claiming under them by virtue of any act done subsequent to the commencement of such suit.

The judgment of the Circuit Court in dismissing the bill forward of equity weeright and it will be affirmed.

Affirmed.

****

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $.....

186 I.A. 551

1001

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1 day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Guillett

vs.

No. 5

October Term, 1913.

Jerrer

~~ERROR TO~~
APPEAL FROM

186 I.A. 551

Circuit COURT

Pope COUNTY

TRIAL JUDGE

Hon. W N Butler

Term No. 5. Agenda No. 2.

October Term, A. D. 1913.

J. W. Gullett, Appellee, v. Illinois Central Railroad Company, Appellant.	Appeal from Pope.

Opinion by Higbee, J.

This suit was begun by appellee before a justice of the peace, where he obtained a judgment of $45.00 for damages claimed to have been occasioned to a peanut roaster in the course of its shipment, upon appellant's railroad. On appeal to the circuit court, there was a verdict and judgment in favor of appellee for $30.00. All the instructions except a peremptory one, presented by appellant, were given by the court below.

On appeal to this court appellant complains there was a lack of evidence to sustain the verdict, and that its rights were prejudiced by the giving of certain instructions offered by appellee.

It appeared from the proofs that appellee was a popcorn vender and owned a popcorn roaster, which he had purchased for $20.00; that after purchasing the same he had a plumber do some work on it and also spent a week of his own time repairing and painting it; that on October 7, 1911, after the machine had been put in repair, he, intending to use it at the Pope county fair then about to open, shipped it by freight from Carlyle, Illinois, to Golconda, Illinois; that it was delivered to the agent of the Baltimore and Ohio South Western Railroad at Carlyle, and was transferred in regular course of shipment to appellant's railroad at Odin; that when the roaster reached its destination at Golconda, it was found the glass in it was broken, the wheels

Term No. 9. Appeals No. 5.

October Term, A. D. 1921.

J. W. Willets,
Appellee,

v.

Illinois Central Railroad
Company,
Appellant.

Transcript from Iroq.

Opinion by Higbee, J.

This suit was begun by appellee before a justice of the peace, where he obtained a judgment of $41.00 for damages claimed to have been occasioned to a personal remnant in the course of its shipment, upon appellant's railroad. On appeal to the circuit court, there was a verdict and judgment in favor of appellee for $50.00. All the instructions except a peremptory one, presented by appellant, were given by the court below.

On appeal to this court appellant complains that there was a lack of evidence to sustain the verdict, and that instructions were prejudiced by the refusal of certain instructions tendered appellee.

It appeared from the proofs that appellee was a dealer vendor and owned a popcorn roaster, which he had purchased for $20.00; that after purchasing this machine he had a mechanic do some work on it and also spent a week of his own time repairing and painting it; that on October 7, 1921, after the machine had been put in repair, he, intending to use it at the Iroq county fair then about to open, shipped it by Illinois Central Railroad, Watseka to Gulcanda, Illinois; that it was delivered to the agent at the Baltimore and Ohio South Western Railroad at Danville, and was transferred in regular course of shipment to appellant's railroad at Gulcanda; that when the roaster reached its destination at Gulcanda, it was found the glass in it was broken, the wheels

twisted, pipes bent and the governor gone.

The questions of fact presented are (first), was the roaster in good condition when received; (second), was it crated when presented for shipment and (third) was it shipped at the owners risk. As to the condition when shipped, appellee testified that it was then all right and that he had spent over $50. for repairs on it and one of appellant's witnesses, a telegraph operator at the point of shipment, also testified to facts tending to show that it was in good condition when it was tendered for shipment. There was no contradictory evidence on this subject and it must be taken as proven that the roaster was in good condition when shipped.

Upon the question of whether the roaster was crated or not when delivered for shipment, the evidence was contradictory but there was sufficient evidence in the proof to support the statement of appellee upon the witness stand that it was crated when delivered to the railroad company for shipment.

The agent for the Baltimore and Ohio Southwestern Railroad Company at Carlyle, testified that appellee told him if the company would not require the roaster to be crated he would assume all responsibility and make no claim for breakage and in this he was corroborated by other employes of said railroad at the shipping point, The testimony of appellee, however, was to the effect that he understood the roaster was to be shipped as first classfreight and that a bill of lading wasgiven him which after the controversy arose between him and appellant, concerning his claim for damages, was delivered to appellant and not returned to him, although he demanded the same.

The jury appear to have taken appellee's version of the matter and upon the whole case we cannot say that their verdict was not warranted by the proofs.

Instruction No. 1 given for appellee, which defines the common law liability of a common carrier, is complained ofby

twisted, pipes bent and the governor gone.

The questions of fact presented are (first), was the roaster in good condition when received; (second), was it crated when presented for shipment and (third) was it shipped at the owners risk. As to the condition when shipped, appellee testified that it was then all right and that he had spent over $50. for repairs on it and one of appellant's witnesses, a telegraph operator at the point of shipment, also testified to facts tending to show that it was in good condition when it was delivered for shipment. There was no contradictory evidence on this subject and it must be taken as proven that the roaster was in good condition when shipped.

Upon the question of whether the roaster was crated or not when delivered for shipment, the evidence was contradictory but there was sufficient evidence in the proof to support the statement of appellee upon the witness stand that it was packed when delivered to the railroad company for shipment.

The agent for the Baltimore and Ohio Southwestern Railroad Company at Carlyle, testified that appellee told him if the company would not receive the roaster to be crated he would assume all responsibility and make no claim for damages and in this he was corroborated by other employes of said railroad at the shipping point. The testimony of appellee, however, was in the effect that he understood the roaster was to be shipped as first mentioned and that a bill of lading was given him which after the controversy arose between him and appellant, concerning his claim for damages, was delivered to appellant and not returned to him, although he demanded the same.

The jury appear to have taken appellee's version of the matter and upon the whole case we cannot say that their verdict was not warranted by the proofs.

Instruction No. 1 given for appellee, which defines the common law liability of a common carrier, is complained of.

appellant, as being improper under the facts in this case. It however states a correct proposition of law and appellee had a right to have the jury instructed upon the law bearing upon his own theory of the case, which there was proof to support. The other objections to the instructions given for appellee do not appear to us to be of a serious nature and upon the whole the series of instructions correctly informed the jury concerning the law applicable to the case.

The judgment of the court below will be affirmed.

Affirmed.

(Not to be published in full.)

specially, as being incorrect under the facts in this case. It however states a correct proposition of law and accordingly had a right to have the jury instructed upon the law bearing upon his own theory of the case, which there was evidence to support. The other objections to the instructions given for appellee do not appear to us to be of a serious nature and upon the whole the series of instructions correctly informed the jury concerning the law applicable to the case.

The judgment of the court below will be affirmed.

AFFIRMED.

[Not to be published full.]

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 562

1007

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the [illegible] *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

The People

vs.

No. 21

October Term, 1913.

Moreland

ERROR TO
~~**APPEAL FROM**~~

186 I.A. 562

Circuit **COURT**

Fayette **COUNTY**

TRIAL JUDGE

Hon. [illegible]

Term No. 21. Agenda No. 20.

October Term, 1913.

The People of the State of Illinois, Defendant in Error, vs. Los Moreland, Plaintiff in Error.	Error to Fayette.

1861 A. 562

Opinion by Higbee, J.

At the February term, 1913, of the circuit court of Fayette County, the grand jury returned an indictment of two counts, charging in the first, the plaintiff in error, Los Moreland and Maud Pinson were living together at and within said county on the 15th day of January, 1913, in an open state of adultery and fornication, the said Los Moreland being then and there a married man and the said Maud Pinson being then and there a single and unmarried woman. The second count charged that said Los Moreland and Maud Pinson at said time and place lived together in an open state of adultery, the said Los Moreland being then and there a married man and the said Maud Pinson being then and there a married woman. Plaintiff in error was tried alone and at the conclusion of the trial the jury returned the following verdict: "We the jury find the defendant Los Moreland guilty of adultery in manner and form as charged in the indictment." The court having denied a motion for a new trial and in arrest of judgment, sentenced plaintiff in error to pay a fine of one hundred dollars and the costs and to stand committed to the county jail until fine and costs were paid.

It appeared from the proofs that plaintiff in error was married at the time he was charged with committing the offense charged in the indictment but that Maud Pinson was divorced from her husband, so that a conviction could only have been had under the

Term No. 21. Agenda No. 20.

October Term, 1913.

The People of the State of Illinois, Defendant in Error, vs. Ios Moreland, Plaintiff in Error.	Error to Fayette.

Opinion by Higbee, J.

At the February term, 1913, of the circuit court of Fayette County, the grand jury returned an indictment of two counts, charging in the first, the plaintiff in error, Ios Moreland and Maud Pinson were living together at and within said county on the 15th day of January, 1913, in an open state of adultery and fornication, the said Ios Moreland being then and there a married man and the said Maud Pinson being then and there a single and unmarried woman. The second count charged that said Ios Moreland and Maud Pinson at said time and place lived together in an open state of adultery, the said Ios Moreland being then and there a married man and the said Maud Pinson being then and there a married woman. Plaintiff in error was tried alone and at the conclusion of the trial the jury returned the following verdict: "We the jury find the defendant Ios Moreland guilty of adultery in manner and form as charged in the indictment." The court having denied a motion for a new trial and in arrest of judgment, sentenced plaintiff in error to pay a fine of one hundred dollars and the costs and to stand committed to the county jail until fine and costs were paid.

It appeared from the proofs that plaintiff in error was married at the time he was charged with committing the offence charged in the indictment but that Maud Pinson was divorced from her husband, so that a conviction could only have been had under the

first count of the indictment, charging the parties named with living together in an open state of adultery and fornication. In Searls v. People, 13 Ill., 597, where there was an indictment against a man and woman charging them with living together in an open state of fornication, the court in discussing the question of what was necessary to constitute the offense said, "In order to constitute this crime the parties must dwell together openly and notoriously upon terms as if the conjugal relation existed between them. In other words they must cohabit together. There must be an habitual illicit intercourse between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, having a demoralizing and debasing influence upon society." The offense named in the statute and charged in the indictment is the living together in an open state of adultery and fornication. The commission of adultery or fornication, however immoral, is not a crime under our statutes, but to constitute a crime there must be an open living together by the parties in such a state.

The jury did not find plaintiff in error guilty of openly living in such state with the woman named, which would have been a punishable crime, but did find him guilty of adultery alone which is not a statutory crime. In Jannsel v. The People, 113 Ill. App., 73, wherein an indictment was returned charging the parties with living together in an open state of adultery and fornication, the jury returned separate verdicts, finding the woman guilty of adultery in manner and form as charged in the indictment and the man guilty of fornication in manner and form as charged in the indictment and the court found the verdict not responsive to the indictment and reversed and remanded the case,

first count of the indictment, charging the parties named with living together in an open state of adultery and fornication. In Searle v. People, 18 Ill., 507, where there was an indictment against a man and woman charging them with living together in an open state of fornication, the court in discussing the question of what was necessary to constitute the offense said, "In order to constitute this crime the parties must dwell together openly and notoriously upon terms as if the continued relation existed between them. In other words they must cohabit together. There must be an habitual illicit intercourse between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, having a demoralizing and debasing influence upon society." The offense named in the statute and charged in the indictment is the living together in an open state of adultery and fornication. The commission of adultery or fornication, however immoral, is not a crime under our statutes, but to constitute a crime there must be an open living together by the parties in such a state.

The jury did not find plaintiff in error guilty of openly living in such state with the woman named, which would have been a punishable crime, but did find him guilty of adultery alone which is not a statutory crime. In Tennel v. The People, 115 Ill. App., 73, wherein an indictment was returned charging the parties with living together in an open state of adultery and fornication, the jury returned separate verdicts, finding the woman guilty of adultery in manner and form as charged in the indictment and the man guilty of fornication in manner and form as charged in the indictment and the court found the verdict not responsive to the indictment and reversed and remanded the case,

saying in its opinion: "Neither adultery nor fornication is charged in the indictment as a substantial offense. Neither considered alone is a statutory crime in this state and neither is indictable at common law.... neither fornication nor adultery, considered alone being a crime or charged as such in the indictment, the verdict is not responsive to the indictment, which charges the offense of unlawfully living together in an open state of adultery and fornication. We think it is too plain to require argument that the verdict does not find the plaintiffs in error were living together in an open state of adultery and fornication. The verdict therefore is not sufficient on which to base a judgment."

The reasoning in the above case applies with equal force to the case presented here and as the verdict is not responsive to the indictment and does not find the plaintiff in error guilty of a crime under our statutes, the judgment which followed the same cannot be sustained. It is unnecessary to discuss the other questions raised by counsel for plaintiff in error, as apart from those relating to the sufficiency of the evidence to sustain a conviction, they are of such a nature as to be readily and properly adjusted in any future trial which may take place. The judgment will be reversed and the cause remanded.

Reversed and remanded.

****

(Not to be reported in full.)

saying in its opinion: "Neither adultery nor fornication is charged in the indictment as a substantial offence. Neither considered alone is a statutory crime in this state and neither is indictable at common law. . . . Neither fornication nor adultery, considered alone being a crime or charged as such in the indictment, the verdict is not responsive to the indictment, which charges the offence of unlawfully living together in an open state of adultery and fornication. We think it is too plain to require argument that the verdict does not find the plaintiffs in error were living together in an open state of adultery and fornication. The verdict therefore is not sufficient on which to base a judgment."

The reasoning in the above case applies with equal force to the case presented here and as the verdict is not responsive to the indictment and does not find the plaintiff in error guilty of a crime under our statutes, the judgment which followed the same cannot be sustained. It is unnecessary to discuss the other questions raised by counsel for plaintiff in error, as apart from those relating to the sufficiency of the evidence to sustain a conviction, they are of such a nature as to be readily and properly adjusted in any future trial which may take place. The judgment will be reversed and the cause remanded.

Reversed and remanded.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $ _____

1005

Appellate Court

n and held at Mt. Vernon, Illinois, on the Fourth Tuesday
, one thousand nine hundred and fourteen, the same be-
Lord, one thousand nine hundred and fourteen.

stice.

W. S. PAYNE, Sheriff.

March term, to-wit: On the 1st day
e of the Clerk of said Court at Mt. Vernon, Illinois, an

~~ERROR TO~~
APPEAL FROM

186 I.A. 563

Circuit COURT

Madison COUNTY

October Term, 1913.

A Schmoller

TRIAL JUDGE

Hon. W E Hadley

Fee $

186 A 563

1005

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Schmoller et al

vs.

No. 26

October Term, 1913.

Schmoller

~~ERROR TO~~
APPEAL FROM

186 I.A. 563

Circuit COURT

Madison COUNTY

TRIAL JUDGE

Hon. W. E. Hadley

Term No. 26. Agenda No. 23.

October Term, 1913.

John B. Schmoeller et al., Appellees, vs. Henry Schmoeller, Appellant.	Appeal from Madison.

186 I.A. 563

Opinion by Higbee, J.

Appellees John B. Schmoeller and his Brother Walter Schmoeller, brought suit against appellant Henry Schmoeller and others for the partition of certain real estate formerly owned by their father and mother, John W. Schmoeller and Lena Schmoeller, both deceased. The bill also asked that appellant Henry Schmoeller be required to account for the rents of a portion of the premises which had been occupied by him after the death of the said John W. Schmoeller. The decree in the court below granted the prayer for partition, directed the payment of certain mortgage indebtedness and also ordered that appellant Henry Schmoeller , pay to the other parties in interest, the sum of $25.00 a month from October 31, 1911, for rent of the premise s occupied by him. Henry Schmoeller has appealed from that portion of the decree requiring him to pay rent for said premises and presents the record relating to the same, to this court for review.

The proofs in the case show that on October 17, 1910, Lena Schmoeller died testate at her homein Alton, Illinois, seized of lots one and two in block ten of the addition of Pope and Others to said city. On said lot two was a six room dwelling house, which was her home, and a shop. By her will she devised her property to her husband, John W. Schmoeller for life, with power to manage, lease, mortgage and convey the same in fee simple, with the further provision that at his death, the same should go to

Term No. 26. Agenda No. 23.

October Term, 1913.

John B. Schmoeller et al., Appellees, vs. Henry Schmoeller, Appellant.	Appeal from Madison.

Opinion by Higbee, J.

Appellees John W. Schmoeller and his Brother Walter Schmoeller, brought suit against appellant Henry Schmoeller and others for the partition of certain real estate formerly owned by their father and mother, John W. Schmoeller and Lena Schmoeller, both deceased. The bill also asked that appellant Henry Schmoeller be required to account for the rents of a portion of the premises which had been occupied by him after the death of the said John W. Schmoeller. The decree in the court below granted the prayer for partition, directed the payment of certain mortgage indebtedness and also ordered that appellant Henry Schmoeller , pay to the other parties in interest, the sum of $23.00 a month from October 31, 1911, for rent of the premises occupied by him; Henry Schmoeller has appealed from that portion of the decree requiring him to pay rent for said premises and presents the record relating to the same, in this court for review.

The proofs in the case show that on October 17, 1910, Lena Schmoeller died testate at her domain dition, Illinois, seized of lots one and two in block ten of the addition of Pope and Others to said city. On said lot two was a six room dwelling house, which was her home, and a shop. By her will she devised her property to her husband, John W. Schmoeller for life, with power to manage, lease, mortgage and convey the same in fee simple, with the further provision that at his death, the same should go to

and become the absolute property of their children. Afterwards on September 25, 1911, her husband, said John W. Schmoeller, died intestate, never having disposed of said property. At the time of his death, he owned an undivided half of certain other real estate in Madison County and this suit included that as well as the property formerly owned by his wife in her life time. Shortly before the death of the father, John W. Schmoeller, the appellant Henry Schmoeller, with his wife and child, moved into the house located on said lot No. two and occupied the same with him. After the death of the father, Henry with his family, continued to occupy the property, using both the dwelling house and the shop located on said premises and was occupying the same at the time this suit was brought. Upon the hearing before the master in chancery, to whom the case was referred, several witnesses testified that on October 30, 1911, there was a meeting between appellant Henry Schmoeller and a number of the appellees at the office of a friend, where the question of the amount of rent to be paid by Henry, was the subject of discussion; that it resulted in an agreement, xxxmade by Henry to pay the tenants in common a rent of $25.00 a month for the premises occupied by him.

On the other hand Henry testified that he did not agree to pay said sum of $25.00 a month for the use of said premises. The master found in favor of appellees and that Henry should pay his co-tenants the sum of $25.00 a month and the court decreed that he pay said amount from October 31, 1911, as rental, for said premises and also found that said amount was a reasonable compensation for the use of said premises. The weight of the proof would seem to support the finding of the master and the decree of the court that the agreement to pay rental at the sum named as claimed by appellees, was really made but even if that is the case, we are of opinion it was not such an agreement as could be enforced, for the reason that one of the adult tenants in common

and become the absolute property of their children. Afterwards on September 25, 1911, her husband, said John W. Schmoeller, died intestate, never having disposed of said property. At the time of his death, he owned an undivided half of certain other real estate in Madison County and this suit included that as well as the property formerly owned by his wife in her life time.

Shortly before the death of the father, John W. Schmoeller, the appellant Henry Schmoeller, with his wife and child, moved into the house located on said lot No. two and occupied the same with him. After the death of the father, Henry with his family, continued to occupy the property, using both the dwelling house and the shop located on said premises and was occupying the same at the time this suit was brought. Upon the hearing before the master in chancery, to whom the case was referred, witnesses testified that on October 30, 1911, there was a meeting between appellant Henry Schmoeller and a number of the appellees at the office of a friend, where the question of the amount of rent to be paid by Henry, was the subject of discussion; that it resulted in an agreement, made by Henry to pay the landlords as common a rent of $25.00 a month for the premises occupied by him.

On the other hand Henry testified that he did not agree to pay said sum of $25.00 a month for the use of said premises. The master found in favor of appellees and that Henry should pay his co-tenants the sum of $25.00 a month and the court decreed that he pay said amount from October 31, 1911, as rental, for said premises and also found that said amount was a reasonable compensation for the use of said premises. The weight of the proof would seem to support the finding of the master and the decree of the court that the agreement to pay rental at the rate stated as claimed by appellees, was really made but even if that is the case, we are of opinion it was not such an agreement as could be enforced, for the reason that one of the adult tenants in common

was not present when the agreement was made and there was no one who was authorized to act for the minors interested in said premises, of whom there were several. Appellant Henry Schmoeller however, should be held to pay a reasonable rent for the occupation of said premises since the death of his father and as the evidence fails to disclose what would amount to a reasonable rent for said premises during its occupation by said appellant, the decree must be reversed and the cause remanded with directions to the court below to ascertain the reasonable rental value of said premises from the death of the father, John W. Schmoeller.

There is some proof tending to show that some of the appellees occupied the premises with appellant, Henry Schmoellerfor a time after the death of John W. Schmoeller and whether such is the fact should also be definitely determined. If it should appear that appellant Henry Schmoeller occupied the premises alone, during the time in question, the decree should provide that he should pay the amount found to be a reasonable rental therefor. If however, it should be proven that some of the appellees occupied the premises with him for a portion of said time, they should be decreed to pay their just proportion of the rent, according to the length of time they shared the occupation of the premises. The decree should further provide that said rent should be paid to the master in chancery for distribution among all of the tenants in common, each to share in the same, in proportion to his or her interest in the real estate, including the one or ones who shall be found liable to pay the same.

The decree will be reversed and the cause remanded for further proceedings in accordance with the directions above given.

Reversed and remanded with directions.

(Not to be reported in full.)

was not present when the agreement was made and there was no one who was authorized to act for the minors interested in said premises, of whom there were several. Appellant Henry Schmoeller however, should be held to pay a reasonable rent for the occupation of said premises since the death of his father and as the evidence fails to disclose what would amount to a reasonable rent for said premises during its occupation by said appellant, the decree must be reversed and the cause remanded with directions to the court below to ascertain the reasonable rental value of said premises from the death of the father, John W. Schmoeller.

There is some proof tending to show that some of the appellees occupied the premises with appellant, Henry Schmoeller, a time after the death of John W. Schmoeller and whether such is the fact should also be definitely determined. If it should appear that appellant Henry Schmoeller occupied the premises alone, during the time in question, the decree should provide that he should pay the amount found to be a reasonable rental therefor. If however, it should be proven that some of the appellees occupied the premises with him for a portion of said time, they should be decreed to pay their just proportion of the rent, according to the length of time they shared the occupation of the premises. The decree should further provide that said rent should be paid to the master in chancery for distribution among all of the tenants in common, each to share in the same, in proportion to his or her interest in the real estate, including the one or ones who shall be found liable to pay the same.

The decree will be reversed and the cause remanded for further proceedings in accordance with the directions above given.

Reversed and remanded with directions.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 565

1006

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Black

vs.

No. 31

October Term, 1913.

Milwaukee — Mechanics Ins Co

~~ERROR TO~~
APPEAL FROM

186 I.A. 565

City **COURT**

E St Louis ~~COUNTY~~

TRIAL JUDGE

Hon. W E Hadley

Term No. 31. Agenda No. 41.

October Term, 1913.

Richard S-lack, Appellee, vs. Milwaukee-Mechanics Insurance Company, Appellant.	Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

This is an appeal from a judgment for $750.00 rendered in favor of appellee, in a suit based on an insurance policy, issued to him by appellant. The suit grew out of the following facts:

On June 4, 1911, appellee with his wife and son lived in a rented house, consisting of six rooms, bath and basement, in East St. Louis. A bout two o'clock in the morning of that day, while his wife was in St. Louis and appellee and his son away on a fishing trip, the house caught fire and it and its contents were partially destroyed. Appellee had four $1,000.00 insurance policies on the contents of the house in four different companies and being unable to effect a settlement, brought suit against the respective companies upon the policies. In a suit against the Security Insurance Company, appellee recovered a judgment for ~~$115.00~~ $775.00 in the city court of East St. Louis. An appeal was taken by the company to this court, where the judgment was reversed and the cause remanded. (Black v. Security Ins. Co. ___ Ill. App.___) The pleadings in that case and the present one, appear to be identical and while the evidence in this case differs from the evidence in the former case in some minor particulars, there were no such substantial additions or variations as to induce the court to change its views as to the proofs, as indicated in the opinion in the former case.

Term No. 31. Agenda No. 41.

October Term, 1913.

Richard S-Jack, Appellee, vs. Milwaukee-Mechanics Insurance Company, Appellant.	Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

This is an appeal from a judgment for $750.00 rendered in favor of appellee, in a suit based on an insurance policy, issued to him by appellant. The suit grew out of the following facts:

On June 4, 1911, appellee with his wife and son lived in a rented house, consisting of six rooms, both and basement, in East St. Louis. A bout two o'clock in the morning of that day, while his wife was in St. Louis and appellee and his son away on a fishing trip, the house caught fire and it and its contents were partially destroyed. Appellee had four $1,000.00 insurance policies on the contents of the house in four different companies and being unable to effect a settlement, brought suit against the respective companies upon the policies. In a suit against the Security Insurance Company, appellee recovered a judgment for ~~$1,000.00~~ $750.00 in the city court of East St. Louis. An appeal was taken by the company to this court, where the judgment was reversed and the cause remanded. (Jack v. Security Ins. Co. ___ Ill. App.___) The pleadings in that case and the present one, appear to be identical and while the evidence in this case differs from the evidence in the former case in some minor particulars, there were no such substantial additions or variations as to induce the court to change its views as to the proofs, as indicated in the opinion in the former case.

Among other errors assigned in both cases, on appeal, were that the city court of East St. Louis had no jurisdiction over cases of this class and that the same should have been dismissed at the second term of the court, on account of appellee's failure to file a copy of the instrument sued on.

These questions are so fully discussed and our views in regard to the same so fully set forth in the opinion in the case against the Security Insurance Company(supra) that to go into a discussion of the same again in this opinion, would simply be a reiteration of what is there set forth and it is sufficient in this case to state that upon further consideration we adhere to the views expressed in the former opinion upon these questions. Appellant in this case, particularly complains of the failure of the court to give an instruction offered by it on the question of damages which told the jury that if they believed from all the evidence, "that immediately after the fire the property alleged to have been damaged, was taken possession of by the police or fire department of the city of East St.Louis and that this department refused to permit the plaintiff Black to enter the premises to protect the property from damage other than that arising from the fire, then you arefurther instructed that even though you may believe the plaintiff entitled to damages caused by the fire, yet you would not be allowed, under the law and such evidence to assess any damages to the property, which grew out of the fact that plaintiff was not permitted to take possession, as under its policy, the defendant insurance company could not be held liable for such damages; if the evidence shows any such damages." This instruction differs from the one referred to in the opinion in the Security Insurance Company case as appearing to assume that there were damages to the property resulting from the fact that appellee was not permitted to take possession of his property at once after the fire,

Among other errors assigned in both cases, on appeal, were that the city court of East St. Louis had no jurisdiction over cases of this class and that the same should have been dismissed at the second term of the court, on account of appellee's failure to file a copy of the instrument sued on.

These questions are so fully discussed and our views in regard to the same so fully set forth in the opinion in the case against the Security Insurance Company (supra) that to go into a discussion of the same again in this opinion, would simply be a reiteration of what is there set forth and it is sufficient in this case to state that upon further consideration we adhere to the views expressed in the former opinion upon these questions. Appellant in this case, substantially complains of the failure of the court to give an instruction offered by it on the question of damages which told the jury that if they believed from all the evidence, "that immediately after the fire the property alleged to have been damaged, was taken possession of by the police or fire department of the city of East St. Louis and that this department refused to permit the plaintiff Hoot to enter the premises to protect the property from damage other than that arising from the fire, then you are further instructed that even though you may believe the plaintiff entitled to damages caused by the fire, yet you would not be allowed, under the law and such evidence to assess any damages to the property, which grew out of the fact that plaintiff was not permitted to take possession, as under its policy, the defendant insurance company could not be held liable for such damages; if the evidence shows any such damages." This instruction differs from the one referred to in the opinion in the Security Insurance Company case as follows: It makes the damages to the property resulting from the fact that appellee was not entitled to take possession of his property at once after the fire,

in that it plainly leaves that question to the jury by the words, "If the evidence shows any such damages."

It was the contention of appellee upon the trial that he desired to enter his house and care for and remove his property after the fire, but was not allowed to do so by the chief of police and that the refusal of the chief of police to permit him to enter, was because of suggestions of the agents of the insurance companies, and a custom of the police to take charge of such matters until such time as the owner should be permitted to enter, and that by reason of such facts appellant should not be permitted any allowance for or to take advantage of the fact that some of the property was injured by neglect and exposure after the fire. The effect of the instruction was to hold that the appellant could not be held liable for any damages other than those arising from the fire.

The contract of insurance as set out in the policy, insured appellee "against all direct loss or damage by fire", such being the contract it does not occur to us how appellee could recover thereon for "damages other than that arising from the fire" as stated in the instruction. This suit is brought upon the contract of insurance and not for damages resulting from any wrongful act of appellant and consequently the right of recovery must depend upon the terms of the contract. The policy further provides that appellant "shall not be liable for any loss caused directly or indirectly .... by order of any civil authority or by theft or by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire." This provision expressly excluded recovery for loss caused "by order of any civil authority", and in a suit upon the contract, appellee evidently could not recover for any such loss. The instruction as offered by appellant should have been given.

in that it plainly leaves that question to the jury by the words, "If the evidence shows any such damages."

It was the contention of appellee upon the trial that he desired to enter his house and care for and remove his property after the fire, but was not allowed to do so by the chief of police and that the refusal of the chief of police to permit him to enter, was because of suggestion of the agents of the insurance companies, and a custom of the police to take charge of such matters until such time as the owner should be permitted to enter, and that by reason of such facts appellant should not be permitted any allowance for or to take advantage of the fact that some of the property was injured by neglect and exposure after the fire. The effect of the instruction was to hold that the appellant could not be held liable for any damages other than those arising from the fire.

The contract of insurance as set out in the policy, insured appellee "against all direct loss or damage by fire", such being the contract it does not occur to us how appellee could recover thereon for "damages other than that arising from the fire" as stated in the instruction. This suit is brought upon the contract of insurance and not for damages resulting from any wrongful act of appellant and consequently the right of recovery must depend upon the terms of the contract. The policy further provides that appellant "shall not be liable for any loss caused directly or indirectly .... by order of any civil authority or by theft or by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire." This provision expressly excludes recovery for loss caused "by order of any civil authority", and in a suit upon the contract, specifically it evidently could not recover for any such loss. The instruction as offered by appellant should have been given.

(3)

Appellant further complains that the proof of loss was permitted to go to the jury generally and not alone to show compliance with the provision of the policy relating to furnishing proof of loss in case of fire. Appellee on the other hand, contends that this is not the case but insists that appellee and wife made out a list of articles destroyed and furnished it to the adjuster to prepare the proof of loss; that the adjuster had several copies of the list made and the paper in evidence was one of these copies and this contention of appellee was established by the proof. Appellee testifiedhe had no independent recollection of the articles destroyed without referring to the list and we think he was entitled to refer to the list to refresh his recollection as to what was destroyed. The list however had the value of each article placed opposite to the same and it should not have been permitted to go to the jury. The list used in this case was identical with the one attached to the proof of loss in this and also in the case against the Security Insurance Company above referred to, and in this as in the former case the list included family clothing,amounting to some $1,300.00 which was shown to have been worn one or more years, and household goods and furniture, which had been used from one to a number of years. Appellee and his wife testified as to the fair cash value of each article and placed such value at the cost price, when new as was done in the former case. In this case, appellee also testified that of $4,385.90 worth of goods shown, by the list and his testimony,to have been destroyed, some $2,441.80 worth, were bought at wholesale and were worth at retail $1,076,72 more than that amount and that the full amount of his loss was therefore $5,462.62.

The policy contained the further provision that "this company shall not be liable beyond the actual cash value of the

Appellant further complains that the proof of loss was permitted to go to the jury generally and not alone to show compliance with the provision of the policy relating to furnishing proof of loss in case of fire. Appellee on the other hand, contends that this is not the case but insists that appellee and wife made out a list of articles destroyed and furnished it to the adjuster to prepare the proof of loss; that the adjuster had several copies of the list made and the proof in evidence was one of these copies and this contention of appellee was established by the proof. Appellee testified had no independent recollection of the articles destroyed without referring to the list and we think he was entitled to refer to the list to refresh his recollection as to what was destroyed. The list however had the value of each article placed opposite to the same and it should not have been permitted to go to the jury. The list used in this case was identical with the one attached to the proof of loss in this and also in the case against the Security Insurance Company above referred to, and in this as in the former case the list included family clothing, amounting to some $1,300.00 which was shown to have been worn one or more years, and household goods and furniture, which had been used from one to a number of years. Appellee and his wife testified as to the fair cash value of each article and placed such value at the cost price, when new as was done in the former case. In this case, appellee also testified that of $4,365.00 worth of goods shown, by the list and his testimony, to have been destroyed, some $2,441.80 worth, were bought at wholesale and were worth at retail $4,070.00 more than their amount and that the amount of his loss was therefore $5,462.85.

The policy contained the further provision that "this company shall not be liable beyond the actual cash value of the

property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deductions for depreciations however caused."

As the judgment in this case wasfor $750.00 the actual cash value must therefore have been found to have been $3,000.00 on all the property destroyed, as the insurance on the property amounted to $4,000.00 and appellant's policy carried only $1000 or one fourth of that amount.

The reasoning adopted by this court in the opinion against the Security Insurance Company above referredto in regard to the improper manner in which the fair cash value of the destroyed and injured property was determined, applies with equal force, to this case. It is evident here asin the former case, that the jury in fixing the value of the property in question, must have been controlled in a large degree by the proof on the part of appellee, which was based on the purchase price of the property instead of the actual cash value at the time of the loss.

The judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

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(Not to be reported in full.)

property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deductions for depreciations however caused."

As the judgment in this case orders $750.00 the actual cash value must therefore have been found to have been $3,000.00 on all the property destroyed, as the insurance on the property amounted to $4,000.00 and appellant's policy covered only $1000 or one-fourth of that amount.

The reasoning adopted by this court in the opinion against the Security Insurance Company above referred to in regard to the improper manner in which the fair cash value of the destroyed and injured property was determined, applies with equal force to this case. It is evident here as in the former case, that the jury in fixing the value of the property in question, must have been controlled in a large degree by the proof on the part of appellee, which was based on the purchase price of the property instead of the actual cash value at the time of the loss.

The judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 582

1009

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

A Knowles

vs.

No. 45

October Term, 1913.

A. & St. Louis & Sub-Ry Co

~~ERROR TO~~
APPEAL FROM

186 I.A. 582

Circuit **COURT**

Madison **COUNTY**

TRIAL JUDGE

Hon. W. E. Hadley

Term No. 45. Agenda No. 35.

October Term, 1913.

Michael Schroeder, Appellee, vs. East St. Louis andSuburban Railway Company, Appellant.	Appeal from Madison.

Opinion by Higbee, J.

This suit was brought by Michael Schroeder, appellee, against appellant, to recover damages for personal injuries received by him, through the alleged negligence of appellant, in operating one of its cars, by means of which he, while riding as a passenger thereon, was violently thrown to the ground.

There is but one count in the declaration and the negligence therein averred, is that as the car approached within about sixty feet of Leclaire, the station where appellee had informed the conductor he wished to get off and where he was informed the car would be stopped for him, he rang the bell as a signal to the employes of appellant operating the car to stop the same; that thereupon the speed of the car slackened and he walked to the back platform and stood there awaiting the stopping of the car to alight therefrom; that instead of stopping the car, those in charge thereof, negligently and carelessly suddenly started the same at a greater speed, thereby causing the car to make a sudden start or lunge and causing appellee who was using due care for his own safety, to unavoidably lose his balance and fall off. The general issue was filedand the trial resulted in a verdict and judgment in favor of appellee for $400.00.

Appellant asserts as reasons why the judgment of the court below should be reversed, that the verdict is not sustained by

Term No. 45. Agenda No. 35.

October Term, 1913.

Michael Schroeder, Appellee, vs. East St. Louis and Suburban Railway Company, Appellant.	Appeal from Madison.

Opinion by Higbee, J.

This suit was brought by Michael Schroeder, appellee, against appellant, to recover damages for personal injuries received by him, through the alleged negligence of appellant, in operating one of its cars, by means of which he, while riding as a passenger thereon, was violently thrown to the ground.

There is but one count in the declaration and the negligence therein averred, is that as the car approached within about sixty feet of Leclaire, the station where appellee had informed the conductor he wished to get off and where he was informed the car would be stopped for him, he rang the bell as a signal to the employes of appellant operating the car to stop the same; that thereupon the speed of the car slackened and he walked to the back platform and stood there awaiting the stopping of the car to alight therefrom; that instead of stopping the car, these in charge thereof, negligently and carelessly suddenly started the same at a greater speed, thereby causing the car to make a sudden start or lunge and causing appellee who was using due care for his own safety, to unavoidably lose his balance and fall off. The general issue was filed and the trial resulted in a verdict and judgment in favor of appellee for $400.00.

Appellant asserts as reasons why the judgment of the court below should be reversed, that the verdict is not sustained by

the evidence and that the court erred in refusing to give certain of its instructions.

The proofs show that the appellant operates an electric car line, running through a station called Mitchell, thence in a southwesterly direction through Edwardsville, continuing southward across the tracks of what is known as the Clover Leaf railroad, through and beyond the place called Leclaire, lying next to or very near Edwardsville. At this point appellant's road runs along the Troy road intersecting nearly at tight angles, Jefferson road and Lincoln road which are some six hundred feet apart. At the intersection of Jefferson road, appellant has a station called Leclaire and its next station is Holyoke, about 200 feet beyond Lincoln road. Appellee got on the car at Mitchell a little before 9 o'clock on the morning of July 4,1913. He testified that he informed the conductor he wanted to get off at Leclaire and that the conductor said all right. This statement was denied by the conductor and at any rate the car did not stop at Leclaire station. As the car passed the booth located at that point, appellant pressed the button, signalling his desire to have the car stop and the conductor gave a signal to the motorman. Shortly afterwards appellee went out on the rear platform of the car, which was some five feet in one way by four the other in size. He stood on the platform some six or eight inches back from the edge of the step with his hands in front of him. There were handholds attachedto the car on each side of him but he did not take hold of them. He claims that while he was waiting there, the car gave a jerk and that he flew out falling upon his head; that the car had not crossed the station before he got on the steps; that it was running "just like generally, just ordinary you know, like ordinarily, then after while pushed me out and gave me a jerk." He also testified that the car was running along in ordinary speed all the time and after

the evidence and that the court erred in refusing to give certain of its instructions.

The proofs show that the appellant operates an electric car line, running through a station called Kirkwall, thence in a southwesterly direction through Edwardsville, continuing eastward across the tracks of what is known as the Glover East railroad, through and beyond the place called Tacoma, lying east to or very near Edwardsville. At this point appellant's road runs along the Troy road intersecting nearly at right angles, Jefferson road and Lincoln road which are some six hundred feet apart. At the intersection of Jefferson road, appellant has a station called Leclaire and its next station is Holyoke, about 200 feet beyond Lincoln road. Appellee got on the car at Kirkwall a little before 9 o'clock on the morning of July 4, 1912. He testified that he informed the conductor he wanted to get off at Leclaire and that the conductor said all right. This statement was denied by the conductor and at any rate the car did not stop at Leclaire station. As the car passed the booth located at that point, appellant pressed the button, signalling his desire to have the car stop and the conductor gave a signal to the motorman. Shortly afterwards appellee went out on the rear platform of the car, which was some five feet in one way by four the other in size. He stood on the platform some six or eight inches back from the edge of the step with his hands in front of him. There were handholds attached to the car on each side of him but he did not take hold of them. He claims that while he was waiting there, the car gave a jerk and that he flew out falling upon his head; that the car had not crossed the station before he got on the steps; that it was running "just like generally, just ordinary you know, like ordinarily, then after while pushed me out and gave me a jerk." He also testified that the car was running along in ordinary speed all the time and after

while got faster and also that when he fot out on the platform it was "running slower than it used to run." By his fall he received a cut on the head, an arm was broken and he was otherwise injured to some extent. He was required to give up his work for some eight weeks and expended $15.00 for medical services.

Appellee was the only one who testified for him to the facts which he claims led up to and existed at the time of his injury. He however introduced one witness who was present on the car at the time of the injury, who gave his version of the affair but failed to corroborate appellee as to any sudden jerk of the car. That witness, Griffing, testified that he was a locomotive engineer; that he was sitting in the car near appellee and noticed him ring the bell at the intersection of Jefferson road and Troy; that appellee sat there for a minute or so, then got up and walked out on the platform; that he noticed appellee as he stood there and also saw him as he hit the ground; that the car was running about ten miles an hour and that there was no jerk or lurch of the car.

On the part of appellant, the conductor testified that shortly after the car had passed Jefferson road he heard a bell and rushed up and gave a signal, but there was no slowing down of the speed of the car before appellee fell off. The motorman testified that after he crossed the Clover leaf tracks he kept speeding up and was going at fifteen miles an hour when Jefferson road was reached; that after he received the bell or signall at Jefferson and Troy road, the car never slackened up until the conductor "hollered" to him to stop, " that there was a fellow fell off the car;" that there was no jerk or lurch of the car.

Five other witnesses for appellant, passengers upon the car

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Appellee was the only one who testified for him to the facts which he claims led up to and existed at the time of his injury. He however introduced one witness who was present on the car at the time of the injury, who gave his version of the affair but failed to corroborate appellee as to any sudden jerk of the car. That witness, Griffing, testified that he was a locomotive engineer; that he was sitting in the car near appellee and noticed his ring the bell at the intersection of Jefferson road and Troy; that appellee sat there for a minute or so, then got up and walked out on the platform; that he noticed appellee as he stood there and also saw him as he hit the ground; that the car was running about ten miles an hour and that there was no jerk or lurch of the car.

On the part of appellant, the conductor testified that shortly after the car had passed Jefferson road he heard a bell and rushed up and gave a signal, but there was no slowing down of the speed of the car before appellee fell off. The motorman testified that after he crossed the flover load tracks he kept speeding up and was going at fifteen miles an hour when Jefferson road was reached; that after he received the bell or signal at Jefferson and Troy road, the car never slackened up until the conductor "hollered" to him to stop, " that there was a fellow fell off the car;" that there was no jerk or lurch of the car.

Five other witnesses for appellant, passengers upon the car

testified either there was no jerk or lurch of the car or that they did not notice any.

Appellee not only failed to support the allegations of his declaration by the weight of the evidence, but the same was so manifestly and overwhelmingly against him that it would be unjust to permit the judgment based upon the verdict in his favor in this case, to stand.

One of the instructions offered by appellant and refused by the court, was as follows: "You are instructed that, although you may believe from the evidence that the defendant did not stop its car for plaintiff to alight, yet that fact does not justify the plaintiff in going upon the platform and so near to the step as to be in a dangerous position while the car was running at a high rate of speed, and if you believe, xxxx from the evidence, that before the defendant's car began to slacken its speed the plaintiff went upon the said platform and near to the steps of said car while it wasrunning at a high rate of speed, and that his action in so doing was negligent, and a lack of due care for his own safety, and that such action on his part helped to bring about his injury, then you should find the defendant not guilty." This instruction submits to the jury, the questions whether appellee did certain acts at the time of and just prior to his injury and also whether the doing of the same, if they found he did them, constituted negligence and a lack of due care for his own safety. These were properly questions of fact for the jury and if found against appellee, would entitle appellant to a verdict in its favor. No other instruction was given which covered the same points as this one and it was error for the court below to refuse it. This instruction differs very materially from the one offered by the appellant in the case of Alton Ry. Gas & Elec. Co. v. Webb, 219 Ill.,563(Affirming 119

testified either there was no jerk or lurch of the car or that they did not notice any.

Appellee not only failed to support the allegations of his declaration by the weight of the evidence, but the same was so manifestly and overwhelmingly against him that it would be unjust to permit the judgment based upon the verdict in his favor in this case, to stand.

One of the instructions offered by appellant and refused by the court, was as follows: "You are instructed that, although you may believe from the evidence that the defendant did not stop its car for plaintiff to alight, yet that fact does not justify the plaintiff in going upon the platform and so near to the step as to be in a dangerous position while the car was running at a high rate of speed, and if you believe, from the evidence, that before the defendant's car began to slacken its speed the plaintiff went upon the said platform and near to the steps of said car while it was running at a high rate of speed, and that his action in so doing was negligent, and a lack of due care for his own safety, and that such action on his part helped to bring about his injury, then you should find the defendant not guilty." This instruction submits to the jury, the questions whether appellee did certain acts at the time of and just prior to his injury and also whether the doing of the same, if they found he did them, constituted negligence and a lack of due care for his own safety. These were properly questions of fact for the jury and if found against appellee, would entitle appellant to a verdict in its favor. No other instruction was given which covered the same points as this one and it was error for the court below to refuse it. This instruction differs very materially from the one offered by the appellant in the case of Alton Ry. Gas & Elec. Co. v. Webb, 219 Ill.,563(Affirming 112

Ill. App. 75) to which our attention has been called by appellee, where the question of a material variance between the declaration and the proof, was sought to be raised by the instruction, and the ruling of the supreme court upon the question there presented, in no wise effects the question arising here.

For the reasons above indicated the judgment ~~mf~~ in this case will be reversed and the cause remanded.

Reversed and remanded.

(Not to be ~~publ~~ reported in full.)

111, App. 75) to which our attention has been called by appellee, where the question of a material variance between the declaration and the proof, was sought to be raised by the instruction, and the ruling of the supreme court upon the question there presented, in no wise affects the question arising here.

For the reasons above indicated the judgment at instance will be reversed and the cause remanded.

Reversed and remanded.

(Not to be ~~pub~~ reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 A 591

1011

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Mattingly Adm.

vs.

No. 47

October Term, 1913.

O'Gara Coal Co.

~~ERROR TO~~
APPEAL FROM

186 I.A. 591

Circuit COURT

Saline COUNTY

TRIAL JUDGE

Hon. A. V. Lewis

Term No. 47. Agenda No. 29.

October Term, 1913.

Martin Mattingly, Administrator, etc., Appellee, vs. O'Gara Coal Company, Appellant.	Appeal from Saline.

Opinion by Higbee, J.

This is a suit brought under the statute in relation to miners, by Martin Mattingly, as administrator of the estate of James Mattingly, deceased, to recover damages for the benefit of the next of kin of the deceased, who at the time of his death, was working in a coal mine of appellant, assisting in running a cutting machine in one of the rooms of said mine. The negligence charged against appellant in the declaration, was stated in three counts. The first charged, that a dangerous condition caused by the loose rock and slate, forming a part of the roof, existed in the room where deceased was working; that such dangerous condition was known to appellant or could have been known by a reasonably careful examination of the room; that it was the duty of appellant to cause to be placed a conspicuous mark at said place of danger, as a notice to said James Mattingly to keep out and that appellant failed to discharge its duties in this regard. The second count charged, in addition to the above, that appellant failed to with-hold the entrance check of deceased and the third charged common law negligence in not furnishing deceased a reasonably safe place in which to work, and that deceased was in the exercise of due care and caution for his own safety at the time of the injury. At the close of the evidence for appellee, after the court, on appellant's motion

October Term, 1913.

Martin Nattingly, administrator, etc., Appellee, vs. D'Ouve Coal Company, Appellant.	Appeal from Salina.

Opinion by Hughes, J.

This is a suit brought under the statute to recover, by Martin Nattingly, as administrator of the estate of James Nattingly, deceased, to recover damages for the benefit of the next of kin of the deceased, who at the time of his death, was working in a coal mine of appellant, running a cutting machine in one of the rooms of said mine. The negligence charged against appellant in the declaration, was stated in three counts. The first charges, that a dangerous condition caused by the loose rock and slate, forming a part of the roof, existed in the room where deceased was working; that such dangerous condition was known to appellant or could have been known by a reasonably careful examination of the room; that it was the duty of appellant to cause to be placed a sufficient prop at said place of danger, as a notice to said James Nattingly to keep out and that appellant failed to discharge its duties in this regard. The second count charged, in addition to the above, that appellant failed to erect-said the safeness chart as required and the third charged common law negligence in not discharging deceased a reasonably safe place in which to work. And that deceased was in the exercise of due care and caution for his own safety at the time of the injury. At the close of the evidence for appellee, after the court, on appellant's motion

had refused to give peremptory instructions in its favor, appellant requested the court to instruct the jury to return a verdict in favor of appellee for the nominal amount of one dollar damages which was denied. Appellant thereupon introduced evidence in its behalf and at the conclusion of the trial, the jury found in favor of appellee, fixing the amount of damages at $750.00, for which amount judgment was entered.

Appellant insists here that the two principal witnesses for appellee, were so impeached by proof of previous contradictory statements made by them, that the verdict should not be permitted to stand, also that the court erred in its rulings on the evidence in regard to the damages and in the matter of instructions.

The proofs show that on August 3, 1911, James Mattingly was working in appellant's coal mine and at eight o'clock that morning was assisting Peter Amberger in running a machine engaged in cutting coal. The room in which they were at work was about thirty feet wide and by nine o'clock they had cut eight runs and were nearly across the room. It was the duty of Mattingly to shovel out of the way the "bug dust", as the fine coal thrown out by the drills of the machines was called by the miners. While so engaged he stooped over to fix a skid for the machine to move on, when suddenly a large piece of slate fell on him, injuring him so that death resulted. There was no contention but that Mattingly received his entrance check and that there was no danger mark at the place where he was injured, but the question is raised as to whether the roof at the place of the injury was in a dangerous condition as charged, and whether this condition could have been ascertained by a reasonably careful examination on the part of appellant made at the usual time required by law.

Amberger, the machine runner, with whom Mattingly worked,

had refused to give peremptory instructions in its favor, appellant requested the court to instruct the jury to return a verdict in favor of appellee for the nominal amount of one dollar damages which was denied. Appellant thereupon introduced evidence in its behalf and at the conclusion of the trial, the jury found in favor of appellee, fixing the amount of damages at $750.00, for which amount judgment was entered.

Appellant insists here that the two principal witnesses for appellee, were so impeached by proof of previous contradictory statements made by them, that the verdict should not be permitted to stand, also that the court erred in its rulings on the evidence in regard to the damages and in the matter of instructions.

The proofs show that on August 3, 1911, James Kattingly was working in appellant's coal mine and at eight o'clock that morning was assisting Peter Amberger in running a machine engaged in cutting coal. The room in which they were at work was about thirty feet wide and by nine o'clock they had cut eight runs and were nearly across the room. It was the duty of Kattingly to shovel out of the way the "bug dust", as the fine coal thrown out by the drills of the machines was called by the miners. While so engaged he stooped over to fix a block for the machine to move on, when suddenly a large piece of slate fell on him, injuring him so that death resulted. There was no contention but that Kattingly received his entrance check and that there was no danger mark at the place where he was injured, but the question is raised as to whether the roof at the place of the injury was in a dangerous condition as charged, and whether this condition could have been ascertained by a reasonably careful examination on the part of appellant made at the usual time required by law.

Amberger, the machine runner, with whom Kattingly worked,

and a miner named Bird, testified to facts, showing that the condition of the roof was dangerous and that its appearance was such that the danger should have been discovered and marked by the mine examiner and this proof was not overcome by the evidence introduced by appellant. The effect of this proof was sought to be overcome by appellant, however, by showing that these two witnesses had made statements before the coroner, when the death of Battingly was being investigated, which were in a number of respects, contradictory to the statements made by them on the trial of this cause. Amberger, however, denied that he made the statements attributed to him before the coroner and Bird, while admitting a part of the statements claimed to have been there made by him, attempted to explain the contradictory features. While the testimony of these witnesses was somewhat unsatisfactory and subject to criticism, yet it was for the jury who saw them on the witness stand and heard them testify, to determine what credit should be given to their testimony and the evidence upon the whole case was sufficient to warrant a verdict in favor of appellee.

Appellant further contends that the proofs show deceased had never been a regular voluntary contributor to the support of any one connected with him and that no more than nominal damages should in any event have been allowed by the jury in this case. The proof however shows that he contributed to the support of both his father and his mother and this was sufficient to sustain the verdict. Appellant complains that evidence was admitted relating to the pecuniary condition or ability to perform manual labor of certain of deceased's next of kin. All this evidence however was afterwards withdrawn by appellee and the jury were instructed by the court not to consider the same. That no harm was done and the jury obeyed this instruction, is

and a minor moral blow, tendeiled to lower, thereby that the condition of the roof was dangerous and that its appearance was such that the danger should have been discovered and marked by the mine examiner and this proof was not overcome by the evidence introduced by appellant. The effect of this proof was weight to be overcome by appellants, however, by showing that three witnesses had made statements before the coroner, when the death of deceased was being investigated, which were in a number of respects, contradictory to the statements made by them on the trial of this cause. Ambrgen, however, denied that he made the statements attributed to him before the coroner and Bird, while admitting a part of the statements claimed to have been there made by him, attempted to explain the contradictory features. While the testimony of these witnesses was somewhat unsatisfactory and subject to criticism, yet it was for the jury who saw them on the witness stand and heard them testify, to determine what credit should be given to their testimony and the evidence upon the whole case was sufficient to warrant a verdict in favor of appellee.

Appellant further contends that the people whom deceased had never been a regular returning workmen for the company of any one connected with him and that no more than nominal damages should in any event have been allowed by the jury in this case. The proof however shows that he contributed to the support of both his father and his mother and this was sufficient to sustain the verdict. Appellant complains that evidence was admitted relating to the pecuniary condition or ability to perform manual labor of certain of deceased's next of kin. All this evidence however was afterwards withdrawn by appellee and the jury were instructed by the court not to consider the same. That no harm was done and the jury obeyed this instruction is

~~shown~~ shown by the small amount given to appellee by the verdict in this case.

Nineteen instructions were given for appellee and twenty-two for appellant which appear to have stated the law applicable to the case, correctly and to have fully covered every phase of the same. While a number of instructions offered by appellant, were refused, yet those which appear to have stated correct principles of law applicable to the case, were fully covered by instructions given by the court for appellant.

The judgment in this case should be and is affirmed.

Affirmed.

(Not to be reported in full.)

shown by the small amount given to appellee by the verdict in this case.

Nineteen instructions were given for appellee and twenty-two for appellant which appear to have stated the law applicable to the case, correctly and to have fully covered every phase of the same. While a number of instructions offered by appellant were refused, yet those which appear to have stated correct principles of law applicable to the case, were fully covered by instructions given by the court for appellant.

The judgment in this case should be and is affirmed.

AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $ _____

186 I.A. 602

1013

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Smith

vs.

No. 55

October Term, 1913.

Stilley

~~ERROR TO~~
APPEAL FROM

186 I.A. 602

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

Hon. J. R. Creighton

Term No. 55. Agenda No. 8.

October Term, 1913.

Jesse R. Smith, Appellee, vs. C. W. Stilley, Appellant.	Appeal from Franklin.

186 I.A. 602

Opinion by Higbee, J.

Appellee brought this suit in assumpsit to recover $221.40 which he claims appellant agreed to pay him to reimburse him for money he had paid out in perfecting the title to certain lands in Franklin County, Illinois. The jury returned a verdict against appellant for $110.70, just one half of the amount sued for and judgment having been entered for that amount, appellant hasbrought the case here that the record may be reviewed. There is no substantial contradiction in the evidence except upon the one question whether appellant agreed to pay appellee the amount of $221.40 for the money paid out by him in perfecting said title, and the only reason urged by appellant, why the judgment in this case should be reversed, is that the verdict was not sustained by the proofs and in that connection, it is further claimed that the amount fixed by the jury shows that the verdict was a compromise, for which there was no foundation in the facts.

The evidence as to the facts in this case, with which we have to do, is as follows: In October, 1911, Jesse R. Smith, appellee, purchased the coal, gas and oil underlying 175 acres of land in Frankfort township and forty acres in Cave township in Franklin County. At that time appellant C. W. Stilley, was engaged in procuring options for such rights in a large block of land in that vicinity, and shortly thereafter appellee gave him

Term No. 55. Agenda No. 8.

October Term, 1916.

Jesse F. Smith, Appellee, vs. C. W. Utility, Appellant.	Appeal from Franklin.

Opinion by Higbee, J.

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The evidence as to the facts in this case, with which we have to do, is as follows: In October, 1913, Jesse F. Smith, appellee, purchased the coal, gas and oil underlying 175 acres of land in Franklin township and forty acres in Cave township in Franklin County. At that time appellant C. W. Utility, was engaged in [illegible] business for such rights in a large tract of land in that vicinity, and shortly thereafter appellee gave him

an option on the 216 acres of mineral rights so purchased by him. The written option was dated November 6, 1911, and ran for three months. The purchase price provided for therein was $35.00 an acre, and by it appellee agreed that in case of sale he would furnish an abstract of title showing good title in him , free and clear of all encumbrances. On January 26, 1912, appellant wrote to appellee that he had sold the land to one Fred A. Busse, Subsequently, in January, 1912, it appeared that the sale to Busse was abandoned because a prospect hole drilled by his engineer did not turn out satisfactorily. At the expiration of the option it was extended on the same terms for five months longer. In April,1912, appellee traded the 176 acres in Frankfort township, to Jesse Dimmond and E. D. Kirkpatrick, for some property in Benton, Illinois, subject to the option held by appellant, and before the deed was made he informed appellant what he had done. Appellant expressed regret and told him the option on the block of land, was being taken up at a price of $30.00 an acre in the name of D. W. Buchanan. Shortly afterwards appellee delivered a deed to Dimond and Kirkpatrick and consummated his trade with them and as soon as it was completed he entered into an agreement with them, to buy the 176 acres back at $30.00 an acre cash. Still later, after conversation with appellant, appellee made a deed of all the land to Buchanan at $30.00 an acre, $100.00 being paid in cash by appellant and the deed put in escrow in a bank. When appellant was preparing to turn the land over to Buchanan, it was found there was no sufficient abstract and that proceedings were necessary to quiet the title. Thereupon the title was perfected and a satisfactory abstract obtained at the cost of $291.40, which amount was paid by appellee. Afterwards appellee demanded that this amount be refunded to him by

an option on the 175 acres of mineral rights so purchased by him. The written option was dated November 9, 1911, and ran for three months. The purchase price provided for therein was $25.00 an acre, and by it appellee agreed that in case of sale he would furnish an abstract of title showing good title in him, free and clear of all encumbrances. On January 26, 1912, appellant wrote to appellee that he had sold the land to one F. Kisner. Subsequently, in January, 1912, it appeared that the sale to Kisner was abandoned, because a prospect hole drilled by his engineer did not turn out satisfactorily. At the expiration of the option it was extended on the same terms for five months longer. In April, 1912, appellee traded the 175 acres in Kirkpatrick township, to Jesse Dimond and E. D. Kirkpatrick, for some property in Benton, Illinois, subject to the option held by appellant, and before the deed was made he informed appellant what he had done. Appellant expressed regret and told him the option on the block of land, was being taken up at a price of $30.00 an acre in the name of D. W. Buchanan. Shortly afterwards appellee delivered a deed to Dimond and Kirkpatrick and consummated his trade with them and as soon as it was completed he entered into an agreement with them, to buy the 175 acres back at $30.00 an acre cash. Still later, after conversation with appellant, appellee made a deed of all the land to Buchanan at $30.00 an acre, $100.00 being paid in cash by appellant and the deed put in escrow in a bank. When appellant was preparing to turn the land over to Buchanan, it was found there was no sufficient abstract and that proceedings were necessary to quiet the title. Thereupon the title was perfected and a satisfactory abstract obtained at the cost of $221.40, which amount was paid by appellee. Afterwards appellee demanded that this amount be returned to him by

appellant who he claims had promised to pay it. Appellant refused and denied any promise or liability in the matter and this suit followed.

There was no direct evidence as to the terms of the claimed agreement, except that of appellant and appellee, though there were certain facts and circumstances shown by the proof bearing upon it. Appellee testified that when he informed appellant he had traded off the 175 acre tract, appellant said it made a gap in his block of land and asked him if he could not get out of the trade; that he told appellant he could not get out of the trade but that maybe he could get the parties to sell it back to him and appellant asked him to do so; that after he got the land back he told appellant he would have to have $31.00 or $32, an acre for it if he was to get up the title and appellant said "if you will go ahead for me I will see you do not lose anything"; and that thereafter when the same question was raised by appellee, appellant said he would take care of him; that finally when the check was given by appellee to pay for the costs of perfecting the title and abstract, appellant said to him, "You give me a check for the advance fees to pay the title and costs and I will give you a check as soon as I get back to Benton"; that he, appellee, gave $30.00 an acre cash to get the land back.

Appellant denied the conversations testified to by appellee so far as they related to any promise or undertaking to repay the costs discharged by him, but stated that appellee came to his office and said he had bought the land back and was ready to turn it over at $30.00 an acre; that when the question of making a good abstract came up, he told appellee the loss in regard to the same would be his, appellee's, and that he would have to have the new abstracts made; that he never did agree to reimburse appellee for the costs of fixing up the title.

appellant who he claims had promised to pay it. Appellant pretended and denied any promise or liability in the matter and this suit follows.

There was no direct evidence as to the terms of the claimed agreement, except that of appellant and appellee, though there were certain facts and circumstances shown by the proof bearing upon it. Appellee testified that when he informed appellant he had traded off his 170 acres tract, appellant said it made a gap in his block of land and asked him if he could not get out of the trade; that he told appellant he could not get out of the trade but that maybe he could get the parties to sell it back to him and appellant asked him to do so; that after he got the land back he told appellant he would have to have $31.00 or $32. an acre for it if he was to get up the title and appellant said "if you will go ahead for me I will see you do not lose anything"; and that thereafter when the same question was raised by appellee, appellant said he would take care of him; that finally when the check was given by appellee to pay for the costs of perfecting the title and abstract, appellant said to him, "You give me a check for the advance fees to pay the title and costs and I will give you a check as soon as I get back to Benton"; that he, appellee, gave $31.00 an acre cash to get the land back.

Appellant denied the conversations testified to by appellee as far as they related to any promise or under[illegible] to repay the costs discharged by him, but stated that appellee came to his office and said he had bought the land back and was ready to turn it over at $30.00 an acre; that when the question of making a good abstract came up, he told appellee the loss in regards to the same would be his, appellee's, and that he would have to have the new abstracts made; that he never did agree to reimburse appellee for the costs of taking up the title.

The circumstances proven and relied upon by the parties for sustaining their respective claims, as to the true facts concering the agreement or want of agreement between them, do not appear to be conclusive on the one side or the other and are not necessary to be set forth here. The evidence in the case is conflicting and cannot be reconciled upon the main question in issue and we are of opinion that the members of the jury who saw the parties upon the witness stand and heard them testify, were, under all the circumstances of this case, best qualified to judge where the truth lay and that their verdict as to the rights of the parties should prevail.

Appellant, however, contends, that the judgment should be reversed and the cause remanded for the reason that the amount of the verdict is not consistent with any view of the law or the evidence in the case; that the claim of appellee was for $221.40 and the proof showed he was entitled to recover that amount if anything, but that the jury evidently split the difference and found a compromise verdict in favor of appellee for one-half of his claim, thereby acquitting appellant of the burden of paying the other half. Appellant cites several cases where judgments based on compromise verdicts have been reversed for that reason. An examination of these cases, however, will disclose that they were reversed at the instance of the plaintiffs therein, because they had recovered less than they were entitled to. The same reasoning however would not appear to apply to a case like this, where appellant seeks to take advantage of the failure of the jury to give a larger verdict against him. This question has recently been before this court in the case of Jones v. Bates, 179 Ill. App., 578, and we there held that a contention similar to that made by appellant here, could not prevail under the well established rules of law and that a defendant could not be heard

The circumstances proven and relied upon by the parties for sustaining their respective claims, as to the true facts concerning the agreement or want of agreement between them, do not appear to be conclusive on the one side or the other and are not necessary to be set forth here. The evidence in the case is conflicting and cannot be reconciled upon the main question in issue and we are of opinion that the members of the jury who saw the parties upon the witness stand and heard them testify, were, under all the circumstances of this case, best qualified to judge where the truth lay and that their verdict as to the rights of the parties should prevail.

Appellant, however, contends, that the judgment should be reversed and the cause remanded for the reason that the amount of the verdict is not consistent with any view of the law or the evidence in the case; that the claim of appellee was for $221.40 and the proof showed he was entitled to recover that amount if anything, but that the jury evidently split the difference and found a compromise verdict in favor of appellee for one-half of his claim, thereby requiting appellant of the burden of paying the other half. Appellant cites several cases where judgments based on compromise verdicts have been reversed for that reason. An examination of these cases, however, will disclose that they were reversed at the instance of the plaintiffs therein, because they had recovered less than they were entitled to. The same reasoning however would not appear to apply to a case like this, where appellant seeks to take advantage of the failure of the jury to give a larger verdict against him. This question has recently been before this court in the case of Jones v. Bates, 179 Ill. App., 578, and we there held that a contention similar to that made by appellant here, could not prevail under the well established rules of law and that a defendant could not be heard

to object because the amount allowed the plaintiff was less than the evidence showed was due him; that the plaintiff alone in such a case is entitled to complain of the smallness of the verdict. (See also Heyman v. Heyman, 210 Ill., 524. Reid v. Houston, 20 Ill. App., 48. Starks v. Schlensky, 128 id. 1.)

We find no substantial reason for reversing the judgment of the court below and it will accordingly be affirmed.

Judgment affirmed.

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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $.....

186 A 603

1014

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Buckley, doing business

vs.

No. 57

October Term, 1913.

Robertson

~~ERROR TO~~
APPEAL FROM

186 I.A. 603

Circuit **COURT**

Marion **COUNTY**

TRIAL JUDGE

Hon. Thos M. Fitt

Term No. 57. Agenda No. 47.

October Term, 1913.

B.E.Buckley, doing business as Colonial Mercantile Agency, Appellee, vs. R. H. Robertson, Appellant.	Appeal from Marion.

Opinion by Higbee, J.

This was a suit on a note for $50.00 payable to the Colonial Mercantile Agency and signed by R. H. Roberteon, the appellant.

At the conclusion of all the evidence, the court, at appellee's request, instructed the jury to return a verdict in favor of appellee for the principal of the note, which was done and judgment entered against appellant for that amount. The case was originally commenced before a justice of the peace, so there were no written pleadings on the trial. Appellant relied on failure of consideration for the note as a defense, and also complains that the court erredingiving appellee's peremptory instruction and in refusing proper evidence which was offered to show want of consideration.

The facts as they appear from the evidence on the trial are as follows: On December 15, 1911, and prior there-to, B. E. Buckley was engaged in the law and collection business in St. Louis, Missouri, conducting the same under the name of the Colonial Mercantile Agency. At the same time appellant was engaged in the Tailoring and "Gents Furnishing Goods" business at Centralia, Illinois. On that day the representative of appellee, called on appellant and procurred from him the note sued on. In return there was delivered to appellant by said representative of

Term No. 87. Agenda No. 47.

October Term, 1913.

B.R.Buckley, doing business as Colonial Mercantile Agency, Appellee, vs. R. H. Robertson, Appellant.	Appeal from Marion.

Opinion by Higbee, J.

This was a suit on a note for $50.00 payable to the Colonial Mercantile Agency and signed by R. H. Robertson, the appellant.

At the conclusion of all the evidence, the court, at appellee's request, instructed the jury to return a verdict in favor of appellee for the principal of the note, which was done and judgment entered against appellant for that amount. The case was originally commenced before a justice of the peace, so there were no written pleadings on the trial. Appellant relied on failure of consideration for the note as a defense, and also complains that the court erroneously sustained appellee's peremptory instruction and in refusing proper evidence which was offered to show want of consideration.

The facts as they appear from the evidence on the trial are as follows: On December 15, 1911, and prior thereto, B. R. Buckley was engaged in the law and collection business in St. Louis, Missouri, conducting the same under the name of the Colonial Mercantile Agency. At the same time appellant was engaged in the Tailoring and "Gents Furnishing Goods" business at Centralia, Illinois. On that day the representative of appellee, called on appellant and procured from him the note sued on. In return there was delivered to appellant by said representative of

appellee a certificate showing that in consideration of $50.00, appellant was entitled for three years to share in the benefits and privileges of the Colonial Mercantile Agency; that said Agency would prosecute all claims listed with it under the terms of the contract; that appellant should have free legal advice on all business matters submitted by him to the Agency's legal department; that ten per cent would be charged on all collections except on claims not over 90 days old on which three per cent would be charged; that the agency would collect $300.00 for appellant within the time and under the terms specified in the contract or refund the full $50.00 retainer fee; that the Agency should have the right to cancel said contract and refund the retainer fee and surrender claims of appellee at any time after eight months; that appellant should send at least a partial list of the claims to the home office within thirty days.

In support of his contention that there was a failure of consideration for the note, appellant offered to testify that at the time the contract in question was taken the representative of plaintiff statedto him, that the company had the ability to and would collect desperate claims that could not be collected in the ordinary manner and method and that such was a part of the plan and purpose of the organization, but the court sustained an objection thereto made by appellee and this ruling is claimed by appellant to have been in error. There was no error in rejecting this testimony for even if it were otherwise competent, the offer did not contain a proposal to show that the representations were false and if they were not false, they would not tend to show any failure of consideration. Appellant also contends that the court erred in refusing to permit him to testify that when the contract was entered into the representative of appellee stated that the Colonial Mercantile Agency was a company or a corporation with a large number of branches and that it had facili-

appellee a certificate showing that in consideration of $50.00, appellant was entitled for three years to share in the benefits and privileges of the Colonial Mercantile Agency; that said Agency would prosecute all claims filed with it under the terms of the contract; that appellant should have free legal advice on all business matters submitted by him to the Agency's legal department; that ten per cent would be charged on all collections except on claims not over 90 days old on which three per cent would be charged; that the agency would collect $200.00 for appellant within the time and under the terms specified in the contract or refund the full $50.00 retainer fee; that the Agency should have the right to cancel said contract and refund the retainer fee and surrender claims of appellee at any time after eight months; that appellant should send at least a partial list of the claims to the home office within thirty days.

In support of his contention that there was a failure of consideration for the note, appellant offered to testify that at the time the contract in question was taken the representative of plaintiff at Yazoo City, that the company had the ability to and would collect desperate claims that could not be collected in the ordinary manner and method and that such was a part of the plan and purpose of the organization, but the court sustained an objection thereto made by appellee and this ruling is claimed by appellant to have been in error. There was no error in rejecting this testimony for even if it were otherwise competent, the offer did not contain a proposal to show that the representations were false and if they were not false, they would not tend to show any failure of consideration. Appellant also contends that the court erred in refusing to permit him to testify that when the contract was entered into the representative of appellee stated that the Colonial Mercantile Agency was a company or a corporation with a large number of branches and that it had facili-

ties for collecting claims in every state and town and that the representative gave the names of several prominent men as members of the company. This offer also failed to contain a proposal to show that these representations were false.

In the progress of the case the court sustained an objection to this question asked appellant by counsel, "Now as far as you have been able to ascertain, did this company have any representative in Centralia, Illinois, until they brought this suit on a note against you?" The proposal of appellant upon this question was to show that the agent had said that the company "had facilities for collecting claims in every city and town" and this could readily be true whether the company had a representative in Centralia at the time or not. The fact that the representative may have claimed that there were a number of prominent men connected with the company when it was a fact that the business was owned by appellee Buckley alone, could not have been of sufficient importance to constitute a failure of consideration for the contract. It further appeared that while appellant had sent a list of claims to appellee for collection, that none of them had been collected through his efforts, but the addresses of some of appellant's debtors were not given in the list and as the contract is still in force and no time was fixed in it within which collections should be made, there has been no breach of the Contract yet in that respect. If appellee should fail to carry out his contract, appellant had his remedy at law for a breach of the same, but such a breach of the contract cannot at this time be set up as a failure of consideration for the note.

Appellant also assigned as error that the court admitted the note in evidence when it had been indorsed by appellee to a bank and by that bank to another and, these indorsements not

tice for collecting claims in every state and town and that the representative gave the names of several prominent men as members of the company. This offer also failed to contain a proposal to show that these representatives were Italian.

In the progress of the case the court sustained an objection to this question asked appellant by counsel, "How so far as you have been able to ascertain, did this company have any representative in Centralia, Illinois, until they brought this suit on a note against you?" The proposal of appellant upon this question was to show that the agent had said that the company "had facilities for collecting claims in every city and town" and this could readily be true whether the company had a representative in Centralia at the time or not. The fact that the representative may have claimed that there were a number of prominent men connected with the company when it was a fact that the business was owned by appellee Buckley alone, could not have been of sufficient importance to constitute a failure of consideration for the contract. It further appeared that while appellant had sent a list of claims to appellee for collection, that none of them had been collected through his efforts, but the addresses of some of appellant's debtors were not given in the list and as the contract is still in force and no time was fixed in it within which collections should be made, there has been no breach of the contract yet in that respect. If appellee should fail to carry out his contract, appellant has a remedy at law for a breach of the same, but such a breach of the contract cannot at this time be set up as a failure of consideration for the note.

Appellant also assigned as error that the court admitted the note in evidence when it had been indorsed by appellee to a bank and by that bank to another and, these indorsements not

having been erased when the note was presented in evidence, it did not appear that appellee was the owner of the same. When the note was offered in evidence by appellee, it was not objected to for the reason above stated but counsel for appellant in objecting to its introduction said, "The note is not made payable to the Colonial Mercantile Agency or order and from the testimony of the witness on the stand, the note is claimed by a man named Buckley who is not named as the payee and the note is not made payable to the Colonial Mercantile Agency or bearer."

It is a general rule of law that objections on a trial to a paper or other evidence must be specifically pointed out so that they may be obviated if possible. Clauser v. Stone, 29 Ill.,114. It is evident that had the objection here made been pointed out when the note was introduced it could readily have been remedied. It also appears from the proof that when appellee attempted to prove ownership of the note, appellant objected to such proof and the court sustained the objection. Appellee was in possession of the note in question and under the above circumstances, appellant was in no position to take advantage of the failure of the former to prove that he was in fact the owner of the same.

The judgment of the court below will be affirmed.

Affirmed.

(Not to be reported in full.)

having been erased when the note was presented in evidence, it did not appear that appellee was the owner of the same. When the note was offered in evidence by appellee, it was not objected to for the reason above stated but counsel for appellant in objecting to its introduction said, "The note is not made payable to the Colonial Mercantile Agency or order and from the testimony of the witness on the stand, the note is claimed by a man named Buckley who is not named as the payee and the note is not made payable to the Colonial Mercantile Agency or bearer."

It is a general rule of law that objections on a trial to a paper or other evidence must be specifically pointed out so that they may be obviated if possible. Clauser v. Stone, 29 Ill., 114. It is evident that had the objection here made been pointed out when the note was introduced it could readily have been remedied. It also appears from the proof that when appellee attempted to prove ownership of the note, appellant objected to such proof and the court sustained the objection. Appellee was in possession of the note in question and under the above circumstances, appellant was in no position to take advantage of the failure of the former to prove that he was in fact the owner of the same.

The judgment of the court below will be affirmed.

Affirmed.

xxxxxxxxxxxxxxxx

(N ot to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

186 I.A. 609

186

1016

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Illinois W. Hess, by B. F. Kagy, her conservator,

vs.

No. 62

October Term, 1913.

Griffith

~~ERROR TO~~
APPEAL FROM

186 I.A. 609

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

Hon. J. C. McBride

Term No. 62. Agenda No. 45.

October Term, 1913.

Illinoi W. Ness, by B. F. Nagy her conservator, Appellee, vs. Marvin J. Griffith, Appellant.	Appeal from Fayette.

186 I.A. 609

Opinion by Higbee, J.

This is an appeal from an order entered upon the hearing of objections, filed to the final report of Marvin J. Griffith, as conservatir of Illinoi W. Ness, an insane person. The hearing was had in the circuit court of Fayette County, where the case had been transferred from the county court, by agreement of the parties.

The following facts were found in the order appealed from: Marvin J. Griffith was appointed conservator of Illinoi W.Ness August 8, 1904, she having been duly adjudged to be an insane person. Illinoi W. Ness was afterwards duly adjudged restored to reason and the conservator filed his final report as such, on July 1, 1910, having acted as conservator from his appointment to that date. She filed objections to said final report and to all other reports made by her said conservator, objecting among other things, to the amounts shown to have been paid to attorneys, to the amount of interest shown by the reports to have been received and to the amount retained by him for his compensation which she alleges was not just and reasonable. The court found in the order that a just and reasonable compensation to the conservator, for his services was $750.00, an amount equal to $100.00 a month, for the first 7½ months of his conservatorship, and an amount equal to $200.00 a month for the balance of the time, making a total of $14,350.00 for his services for

September Term, 1912.

Illinois V. Hess, by S. F. Hogg her conservator, Appellee. vs. Harris C. Griffith, Appellant.	Appeal from Appeals.

186 I.A. 609

A plaine by Ripley, J.

This is an appeal from an order entered upon the hearing of objections, filed to the final report of Marvin J. Griffith, as conservator of Illinois V. Hess, an insane person. The insanity was had in the circuit court of Fayette County, where the case had been transferred from the county court, by agreement of the parties.

The following facts were found in the order appealed from: Marvin J. Griffith was appointed conservator of Illinois V. Hess August 3, 1904, she having been duly adjudged to be an insane person. Illinois V. Hess was afterwards duly adjudged restored to reason and the conservator filed his final report as such, on July 1, 1912, having acted as conservator from his appointment to that date. I he filed objections to said final report and to all other reports made by her said conservator, objecting among other things, to the amounts shown to have been paid to attorneys, to the amount of interest shown by the reports to have been received and to the amount retained by him for his compensation which she alleges was not just and reasonable. The court found in the order that a just and reasonable compensation to the conservator, for his services was $750.00, an amount equal to $10.00 a month, for the first 72 months of his conservatorship, and an amount equal to $500.00 a month for the balance of the time, making a total of $8,750.00 for his services for

seven years and eleven months. The court further found that the conservator had received interest at the rate of six per cent per annum on the funds of said estate during said period, and had only accounted for three per cent in his reports, retaining the balance, amounting to $30,907.39 as compensation; that deducting the amount found to be reasonable compensation as above stated from the amount retained by him, there was a balance of $12,657.39 in the hands of the conservator not accounted for by him; that there was no evidence that the amount paid out by him for attorneys fees, was unreasonable; that the objection to each report as to the compensation allowed or retained by said conservator for his compensation, was sustained and it was ordered that appellant pay to Illinoi W. Hess said sum of $12,657,39 with five per cent interest thereon from the 18th day of February, 1913. From the order so entered this appeal was taken by said conservator, Marvin J. Griffith.

C ross errors were filed by appellee but he does not ask that they be considered unless the order in this case is reversed on the errors assigned by appellant, so the question now presented for our consideration, is did the court below err in entering an order requiring appellant, to account for and pay to appellee $12,657.39 retained by him from the interest collected on the estate of his ward.

The proofs show substantially the following state of facts: Illinoi W. Hess and her mother, Mrs. Barnett, in the spring of 1904 and prior thereto, lived together in S helby county, Illinois, and were possessed of a large amount of personal property and real estate. The mother died intestate in that year and Mrs. Hess, who was her only heir at law, was appointed administratrix of her estate and shortly afterwards moved to Brownstown, Fayette county, Illinois, where appellant, who was related to her by marriage, lived and carried on a general store in connection with two partners. Appellee turned over all her own notes and those of the estate of her mother, about $135,000.00

seven years and eleven months. The court further found that the conservator had received interest at the rate of six per cent per annum on the funds of said estate during said period, and had only accounted for three per cent in his reports, retaining the balance, amounting to $30,007.39 as compensation; that deducting the amount found to be reasonable compensation as above stated from the amount retained by him, there was a balance of $14,607.39 in the hands of the conservator not accounted for by him; that there was no evidence that the amount paid out by his for attorneys fees, was unreasonable; that the objection to such report as to the compensation was sustained and it was ordered that appellant pay to Illinois W. Ross said sum of $12,607.39 with five per cent interest thereon from the 18th day of February, 1913. From the order so entered this appeal was taken by said conservator, Marvin L. Griffith.

allowed or retained by said conservator for his compensation,

C ross errors were filed by appellee but he does not ask that they be considered unless the order in this case is reversed on the errors assigned by appellant, so the question now presented for our consideration, is did the court below err in entering an order requiring appellant, to account for and pay to appellee $12,607.39 retained by him from the interest collected on the estate of his ward.

The proofs show substantially the following state of facts: Illinois W. Ross and her mother, Mrs. Barnett, in the spring of 1904 and prior thereto, lived together in S helby county,Illinois,and were possessed of a large amount of personal property and real estate. The mother died intestate in that year and Mrs. Ross, who was her only heir at law, was appointed administratrix of her estate and shortly afterwards moved to Brownstown, Fayette county, Illinois, where appellant, who was related to her by marriage, lived and carried on a general store in connection with two partners. Appellee turned over all her own notes and those of the estate of her mother, about $12,000.00

in all, to appellant, to manage for her. About this time the Board of Review of Shelby county, caused proceedings to be instituted to collect back taxes from Mrs. Hess personally and from the estate of her mother, Mrs. Harnett, claiming nearly $5,000.00. Appellee, who was not in good physical health, became nervous and depressed and about July 7, 1904, was taken to a sanitarium at Jacksonville. Appellant visited her there and was told by the superintendent that it would be necessary to have an order of court adjudging her insane, if he should retain her in that institution. Appellant thereupon, upon consultation with his attorney, caused an inquest to be held in the county court of Morgan county where she was adjudged insane. Thereafter Judge Truman E. Ames was appointed administrator de bonis non of the estate of Mrs. Hartnett and appellant appointed conservator of appellee. Appellant turned over the notes belonging to the estate to Judge Ames, amounting to some $99,000.00 and retained those belonging to his ward, amounting to about $37,000.00. Judge Ames afterwards settled the tax suit for some $2300.00 and at the conclusion of the administration, in March, 1905, turned the notes back to appellant, so that at that time the estate of Mrs. Hess in the hands of appellant, consisting of notes and mortgages, amounted to about $137,000.00. He also had charge of certain real estate belonging to her consisting of 160 acres of land in Fayette County, a brick and frame store building in Effingham, a poultry house at Shelbyville, a dwelling house at Tower Hill and some vacant lots in Shelbyville and Colorado. Subsequently some real estate was taken in settlement of mortgages and converted into cash by appellant. Appellant made a number of trips to look after the Illinois real estate and also made some repairs and improvements on some of it. Mrs. Hess returned from Jacksonville in June, 1905, and resided for some two years and three months with Mr. Griffith at Brownstown, removing after that to Effingham.

in all, to appellant, to manage for her. About this time the board of trustees of a Delta county, proposed presumably to be instituted to collect back taxes from Mrs. Hess personally and from the estate of her mother, Mrs. Hassett, claiming nearly $5,000.00. Appellee, who was not in good physical health, became nervous and depressed and about July 1, 1924, was taken to a sanitarium at Jacksonville. Appellant visited her there and was told by the superintendent that it would be necessary to have an order of court adjudging her insane. If he should retain her in that institution. Accordingly thereupon, upon consultation with his brother, counsel on Lawyer to be held in the county court of Hedges county where she was adjudged insane. Thereafter Judge Frank E. Hess was appointed administrator de bonis non of the estate of Mrs. Hassett and qualified. Appellant appointed conservator of appellee. Appellant turned over the notes belonging to the estate to Judge Hess, amounting to some $99,000.00 and retained those belonging to his own, amounting to about $27,000.00. Judge Hess afterwards settled the tax suit for some $2300.00 and at the conclusion of the administration, in March, 1926, turned the notes back to appellant, so that at that time the estate of Mrs. Hess in the hands of appellant, consisting of notes and mortgages, amounted to about $127,000.00. He also had charge of certain real estate belonging to her consisting of 160 acres of land in Hayette County, with and three store buildings in Jefferson, a residence house at Quincyville, a dwelling house at Lower Hill, and some vacant lots in Quincyville and Calumet. A homestead also real estate was taken in settlement of mortgages and conveyed his wife by appellant. Appellant made a number of trips to look after the Illinois real estate and also made some repairs and improvements on some of it. Mrs. Hess returned from Jacksonville in June, 1926, and resided for some two years and lived with her husband at Hyrnestown, moving after XXX that to Pittsburgh.

Appellant visited her a number of times at Jacksonville and afterwards at Effingham, making in all from 25 to 30 trips to the two places, He testified that he devoted about one-half of his time to looking after her business, but during this time he, in connection with his two partners, carried on the mercantile business which, in addition to them, required the services of four or five clerks and he was also loaning considerable money of his own. It was stipulated on the trial that all the money of appellee was loaned all the time at the rate of six per cent per annum. In July, 1913, appellee, was by an order of court adjudged restored to reason and thereupon appellant filed his final report. Each year for seven consecutive years prior to the filing of his final report, appellant had filed an annual report. In each of these reports he had charged himself with three per cent interest on the balance shown to have been in his hands by his last previous report, and also upon any additional sums he had received during the year, for the time the same had been in his hands. It also appeared that the rents on the real estate were collected by agents except those derived from the farm and that such agents were paid out of the rents collected. The farm was rented for cash rent with the exception of one year when grain rent was paid. These annual reports were approved by the county court and appellant was permitted to retain the other three per cent of the principal collected by him as interest, as his compensation. The total amount so retained by him during the time he served as conservator being$30,907.39.

It also appeared from the proofs that when he took charge of Mrs. Hess' business before he was appointed conservator, the agreement was that he was to receive as compensation for his services, one per cent and he expressed a willingness to make a similar arrangement with Mrs. Hess after his discharge.

Appellant visited her a number of times at Jacksonville and afterwards at Kilkenny, making in all from 25 to 30 trips to the two places. He testified that he devoted about one-half of his time to looking after her business, but during this time he, in connection with his law practice, worked up the business-this business alone. In addition to this, received six weeks of four or five cents and he was also loaning considerable money of his own. It was stipulated on the trial that all the money of appellee was loaned all the time at the rate of six per cent per annum. In July, 1910, appellee, was by an order of court adjudged bankrupt to pay and bankruptcy appellant filed his final report. Each year for seven consecutive years prior to the filing of his final report, appellant had filed an annual report. In each of these reports he had charged himself with three per cent interest on the balance shown to have been in his hands by his last previous report, and also some additional sums he had received during the year, for the time the same had been in his hands. It also appeared that the rents on the real estate were collected by agents. Some derived from the farm and that such agents were paid out of the rents collected. The farm was rented for each year with the exception of one year when again rent was paid. These annual reports were approved by the county court and appellant was permitted to retain the other three per cent of the principal collected by him as interest, as his compensation. The total amount so retained by him during the time he acted as executor was $[illegible].

It also appeared from the proofs that when he took charge of Mrs. Jones' business before he was appointed executor, the agreement was that he was to receive as compensation for his services, one per cent and he expressed a willingness to make a similar arrangement with Mr. Jones after his discharge.

No evidence was introduced by appellant tending to show that Mrs. Hess was in a normal condition of mind after she returned from Jacksonville, although the order adjudging her restored to reason, was not entered for seven years later. Appellant testified he showed her the reports each year and that she knew what he was charging and that she stated she was satisfied therewith. He also introduced in evidence three letters from her to the same effect. The testimony for appellee tended to show that appellant presented his reports to Mrs. Hess each year, but did not go over them with her and that she did not realize the large amount he was retaining for his work. During the time he acted as conservator, appellant procured a surety company to sign his bond with him and the charges for the services of the company were paid for by the estate of his ward.

A large volume of testimony was taken on the question of what was a reasonable compensation for appellant's services as conservator. That introduced on the part of appellant showed that it had been the practice in the county court of Fayette county for the last thirty years, to permit all conservators accounting in said court, to retain all interest on the funds of their respective estates in excess of three per cent per annum as compensation, regardless of the size of the estate or rate of interest received, and that it was by such rule appellant's compensation was fixed in his annual reports; but the present county judge testified the largest estate he could remember as being in his court in the last eight years, amounted to $10,000.00. A number of witnesses testified on the part of appellant that three per cent on the principal was a reasonable compensation, while a number testifying for appellee, were equally positive that one per cent was reasonable.

Appellant here insists (1) that as there was no fraud concealment or mistake, connected with the annual reports made

A witness was introduced by appellant tending to show that her case was in a normal condition or mind after she returned from Mocksville, although the order adjudging her neglected to relieve, yet not adjudge for seven years thereafter. Appellant testified he moved her the seventh week year and that she knew what he was starting and that she was relieved thereafter. He also introduced in evidence three letters from her to the same effect. The testimony for appellee tended to show that appellant presented his reports to her. Some time prior, but did not go over them with her and that she did not realize the large amount he was retaining for his work. During the time he acted in conservator, appellant presented a note, secured to sign his bond with him and the charges for the services of the company were paid for by the estate of his ward.

A large volume of testimony was taken on the question of what was a reasonable compensation for appellant's services as conservator. That introduced on the part of appellant showed that it had been the practice in the county court of Lenoir county for the last thirty years, to permit all conservators assuming in said court, to retain all interest on the funds of their respective estates in excess of three per cent per annum as compensation, regardless of the size of the estate or rate of interest received, and that it was by such rule upon Lamb's compensation was fixed in his annual reports; but the present county judge testified the largest estate he could remember as being in his court in the last eight years, amounted to $10,000.00. A number of witnesses testified on the part of appellant that three per cent on the principal was a reasonable compensation, while a number testifying for appellee, were equally positive that one per cent was reasonable.

Appellant here raises (1) that a mere non-feasance, concealment or mistake, unmasked the amount reported

by him, there can be no review of the same on final hearing; (2) that appellee being rational and having a true comprehension of her business affairs and knowing and agreeing to appellant's charges as conservator in managing her estate, cannot now be heard to object notwithstanding appellant was acting as her conservator; and (3) that three per cent per annum was a reasonable and just compensation for the services rendered by him and that he should be permitted to retain that amount. These contentions will be considered in the order stated.

It is conceded that appellant received a large amount of interest that he failed to put in his reports and while it is true that he was permitted by the court to make such reports and retain the omitted interest, yet the same were nevertheless, as a matter of fact, erroneous, irregular and a legal fraud against the ward, notwithstanding the fact that appellant did not intend any actual fraud. The statements made by appellant, like those made by personal representatives generally, were in effect ex parte and it is a general rule of law that "annual or partial settlements of personal representatives when made ex parte as they usually are, have not, like a final settlement, the force and effect of judgments and are not conclusive but are only prima facie evidence of the correctness of the account stated." 18 Cyc. 1194 note 89. Interlocutory settlements like the annual settlements of a conservator, guardian, executor or administrator, may be prima facie correct, but are not conclusive in favor of the personal representative against the party or parties interested in the estate. 22 Cyc. 1152. Reizer v. Mertz, 223 Ill. 555.

This court in Wilcox v. Parker 33 Ill.App. 429, in a case somewhat similar to this, affirmed an order of the circuit court requiring a conservator, who had made annual reports which had been approved by the county court, to restate his final report

made after his ward had been restored to reason, so that it would contain a recapitulation of all his former reports and would show him indebted to his ward in the amount of several hundred dollars, when the reports presented by him showed that he was not indebted to the ward in any amount.

In the course of the opinion it is said, "It is insisted, however, that the appellee made yearly reports and had included therein these items disallowed by the circuit court and such reports were approved by the county court, such reports are not open for a reconsideration by the court when the conservator files his final report and asks for his discharge. We do not so understand the law. So long as the conservator is still engaged in the execution of his trust, his annual reports made by him and approved by the county court upon an ex parte application are, at most, only prima facie evidence of the proper conduct and management of the estate. Until he has finally accounted and been discharged there is no occasion for the ward to resort to a court of equity to ascertain in what manner he has executed his trust; as upon final report being made and notice served upon the ward, upon being restored to reason, he can appear in the county court and have all such matters investigated as well as in a court of equity." We are satisfied and adhere to the reasoning expressed in the above opinion as herein set forth and are of opinion that the annual reports made by appellant in this case, while prima facie correct, could not properly prevent a full investigation of his accounts when he presented his final report and askedfor a discharge. Nor was the court below prevented from causing appellant's accounts to be recast by reason of the fact that the ward had signified her satisfaction with his conduct and her desire to have him continue in the transaction of her business after her return from Jacksonville. Even if she had comprehended the reports and the charges made against her by appellant, it is doubtful whether under the cir-

made after his ward had been restored to reason, so that it would contain a recapitulation of all his issue reports and would show his indebted to his ward in the amount of several hundred dollars, when the reports presented by him showed that he was not indebted to the ward in any amount.

In the course of the opinion it is said, "It is insisted, however, that the appellee made yearly reports and had included therein these items disallowed by the circuit court and such reports were approved by the county court, such reports are not open for a reconsideration by the court when the guardian files his final report and asks for his discharge. It is not so understand the law. As long as the guardian is still engaged in the execution of his trust, his annual reports made by him and approved by the county court are not conclusive, but are, at most, only prima facie evidence of the proper conduct and management of the estate. Until he has finally accounted and been discharged there is no occasion for his ward to resort to a court of equity to ascertain in what manner he has managed his trust; as upon final report being made and notice served upon the ward, upon being restored to reason, he can appear in the county court and have all such matters investigated as well as in a court of equity." [illegible] to the reasoning expressed in the above opinion we herein set forth and are of opinion that the annual reports made by guardian in this case, while prima facie correct, could not necessarily prevent a full investigation of his accounts when he presented his final report and asked for a discharge. For was the court below prevented from counting appellant's accounts to be correct by reason of the fact that the ward had signified her satisfaction with his conduct and her desire to have him continue in the management of her business after her return from Jeffersonville. Even if she had exonerated the guardian and the sureties on his bond against her by appellant, it is doubtful whether under the cir-

cumstances of this case, appellant could have sustained his claim for such exhorbitant compensation against her. The proofs fully show that even if she was not actually insane after her return from Jacksonville, she had little comprehension of business matters and as appellant was a thorough business man the two were not dealing upon equal terms. At any rate it appears to us to be wholly unjust that appellant should be permitted, by reason of his position a s conservator of Mrs. Bess, to make and collect exhorbitant charges against her and then free himself from legal liability therefor to her, when she seeks to claim her rights by asserting that although he acted as conservator for her on the theory that she was insane, yet she was not actually an insane person, but understood what he was doing.

The statute provides that " Conservators on settlement shall be allowed such fees and compensation for their services, as shall seem reasonable and just to the court (Revised Stat. chap. 86, sec.36) and it remains to be considered whether the amount allowed the conservator by the court in this case, was proper under the terms of the law. It appears there was a hard and fast rule or custom of the county court of Fayette county, in use for some thirty years, which allowed conservators to retain all over three per cent of the annual interest on the funds in their hands belonging to their wards. It is evident that an inflexible rule of this kind cannot be properly followedin all cases in fixing the compensation allowed by statute. There might be some cases where the income was small and the labor, temporarily at least, somewhat arduous and where the income from the estate in excess of three per cent would be wholly inadequate to pay the conservator for his services; while it is evident that there might be other cases where the income was very large and the estate so invested as to be easily of collection, in which an allowance of all over three per cent of the

circumstances of this case, appellant could have sustained his claim for such exhorbitant compensation against her. The record fully show that even if she was not actually insane after her return from Jacksonville, she had little comprehension of business matters and as appellant was a thoroughly business man the two were not dealing upon equal terms. At any rate it appears to me to be wholly unjust that appellant should be permitted, by reason of his position as a conservator of her. Case, to make and collect exhorbitant charges against her and then free himself from legal liability therefor to her, when she seeks to claim her rights by asserting that although he acted as conservator for her on the theory that she was insane, yet she was not actually an insane person, but understood what he was doing.

The statute provides that " Conservators on settlement shall be allowed such fees and compensation for their services, as shall seem reasonable and just to the court (Revised Stat. chap. 85,sec.36) and it remains to be considered whether the amount allowed the conservator by the court in this case, was proper under the terms of the law. It appears there was a hard and fast rule or custom of the county court of Fayette county, in use for some thirty years, which allowed conservators to retain all over three per cent of the annual interest on the funds in their hands belonging to their wards. It is evident that an inflexible rule of this kind cannot be properly followed in all cases in fixing the compensation allowed by statute. There might be some cases where the income was small and the labor, temporarily at least, somewhat arduous and where the income from the estate in excess of three per cent would be really inadequate to pay the conservator for his services; while it is evident that there might be other cases where the income was very large and the estate so invested as to be easily of collection, in which an allowance of all over three per cent of the

income to the conservator, for his services, would be exorbitant. The witnesses who testified upon this subject placed the just and reasonable compensation at from one to three per ~~cent~~ cent on the principal annually, with the preponderance tending toward the smaller amount. In this connection it is of advantage in arriving at a correct conclusion, to consider what the conservator himself considered his services worth. Prior to the time he became conservator, he attended to the business of Mrs. Hess for a charge of one per cent per annum on the fund and after he was discharged as conservator, he offered to attend to it for the same compensation.

It appears from the evidence that there were no additional duties cast upon appellant as conservator, in the matter of attending to the estate, to those which he assumed prior to his appointment, or would assume had he continued to act after the termination of his trust. It would seem therefore from appellant's own estimate of the value of his services, as well as from a preponderance of the evidence in the case, that a charge of one per cent annually on the estate managed by him, would have been reasonable and just compensation to appellant for his services. The court below was liberal in its allowance of compensation to appellant, giving him much more than one per cent and the contention of the latter that he should be allowed more than the amount fixed by the trial court, appears to us to be without merit.

The judgment order of the court below will be affirmed.

Affirmed.

Not

(To be reported in abstract only.)

income to the conservator, for his services, would be apportionment. The statutes also instruct upon this subject. Under the just and reasonable compensation of from one to three per cent on the principal annually, with the conservatorship having the smaller amount. In this connection it is of advantage in arriving at a correct conclusion, to consider what the conservator himself considered his services worth. Prior to the time he became conservator, he attended to the business of the estate for a charge of one per cent per annum on the fund and after he was discharged as conservator, he offered to extend to it for the same compensation.

It appears from the evidence that there were no additional duties cast upon appellant as conservator, in the matter of attending to the estate, to those which he assumed prior to his appointment, or would assume had he continued to act after the termination of his trust. It would seem therefore from appellant's own estimate of the value of his services, as well as from a preponderance of the evidence in the case, that a charge of one per cent annually on the estate managed by him, would have been reasonable and just compensation to appellant for his services. The court below was liberal in its allowance of compensation to appellant, giving him much more than one per cent and the contention of the latter that he should be allowed more than the amount fixed by the trial court, appears to us to be without merit.

The judgment order of the court below will be affirmed.

Affirmed.

[illegible]

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Telford v. Wilkinson

vs.

No. 53

October Term, 1913.

Smith, et al

~~ERROR TO~~
APPEAL FROM

186 I.A. 631

Circuit COURT

Marion COUNTY

TRIAL JUDGE

Hon. Thos. M. Gill

IN THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT,

October Term, A. D. 1913.

J. R. TELFORD AND C. E. WILKINSON, doing business as Telford & Wilkinson, Appellees,	)
vs.	)
T. M. SMITH AND EARL C. HUGGINS, (T. M. Smith, Appellant).	)

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY.

Per Curiam

Appellees brought suit in the Circuit Court of Marion County to restrain appellant from engaging in the business of buying, selling or shipping grain and hay and from buying or selling buggies, wagons or harness, either by himself, through an agent or otherwise in the City of Kinmundy in the County of Marion and State of Illinois, so long as complainants or either of them were engaged in said business in said City.

Appellees' claim for such restraining order is based upon a contract made between appellees and appellant whereby appellees were to purchase from appellant his grain elevator and hay barn located on the right-of-way of the Illinois Central Railroad Company in said City, together with the lease appellant held from said railroad company under which the privilege was given appellant to maintain said building on the railroad company's right-of-way. The contract also provided that appellant was to sell and appellees were to purchase a stock of wagons, buggies, and harness located in a store room in said City of Kinmundy.

There is no dispute between the parties that appellant Smith was to sell and did sell the appellees his grain elevator, hay barn and the stock of buggies, wagons and harness together with the good will of said business, and that appellant Smith was not to engage in the business of buying and selling grain and hay, buggies, wagons and harness in the City of Kinmundy so long as appellees were engaged in such business at that place. There is no dispute that appellees paid appellant Smith substantially the whole amount of appellants claim. There is no dispute either that appellant Smith after the sale and transfer of the business to appellees entered upon the same kind of business at said City of Kinmundy as that in which he was engaged before said sale.

The appellant Smith bases his right to avoid the provisions of the contract whereby he was not to engage in such business at that place on the claim made by him that appellees refused to invoice a few items of personal property. As to these items there is a conflict of the oral evidence whether they were to have been invoiced and the written contract does not mention them.

The trial court found that the contract of purchase had been fully complied with on the part of appellees, and we think the evidence fully sustains such finding.

The only remaining question to be determined is whether the contract not to engage in business can be enforced against appellant Smith.

Such contracts are universally recognized as binding on the parties when the limitations as to place and time are specifically mentioned. Here the place was the City of Kinmundy. The time was while the appellees were engaged in such business at that place. The inducement to buy a business very often is largely based on an agreement of this character. We find nothing in the contract which if enforced, would be against public policy.

The decree of the Circuit Court should be and is affirmed.

Not to be reported in full

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $

arch Term, 1915, No.

15 - 19320

ELSIE NELSON, Defendant in Error,	)	
vs.	)	Error to Superior Court, of Cook County
EPHRAIM SWANSON, Plaintiff in Error.	)	

186 I.A. 632

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to review an order of the Superior Court of Cook County denying a motion of plaintiff in error to quash a writ of capias ad satisfaciendum issued after the return of a writ of fieri facias, nulla bona, and after a creditor's bill was filed, and for a discharge from arrest thereunder.

It is urged that the affidavit is defective and fatal because an unreasonable length of time intervened between the time the affidavit was sworn to, and the day it was filed in court. This point is without merit. The record shows that the judgment was entered in a case wherein malice was the gist of the action. The court was authorized to order a capias against the body of plaintiff in error upon the mere motion of defendant in error based on the record without any affidavit. (Sec. 5, Chap. 77, Hurd's R. S.) Siebel v. Kuttnauer, 147 Ill. App. 627; Jernberg v. Wix, 199 Ill. 254. Whether the affidavit was filed within a reasonable time after it was sworn to, or whether it was sufficient to justify the issuance of the capias is wholly immaterial.

The affidavit merely brought to the attention of the court matters of record in the cause which warranted the order of court. The finding in the order as to what the affidavit showed was unnecessary and immaterial.

The filing of a creditor's bill by defendant in error did not cut off her right to resort to the remedy provided by statute for the enforcement of the judgment by capias, the judgment being unsatisfied. Bradner, Smith & Co. v. Williams, 178 Ill.480; Vansant v. Allmon, 23 Ill. 30.

The order is affirmed.

AFFIRMED.